

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

TEMECULA VALLEY UNIFIED  
SCHOOL DISTRICT AND THE  
RIVERSIDE COUNTY DEPARTMENT OF  
MENTAL HEALTH

OAH CASE NO. 2011060230

DECISION

This matter was heard before Eileen M. Cohn, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, on January 23, 24, 25 and 26, 2012 in Temecula, California. Closing arguments were heard telephonically, on January 30, 2012.

Eric B. Freedus, Attorney at Law, represented Student. Student's Mother (Mother) was also present at the hearing. Student was not present.

Lauri A. LaFoe, Attorney at Law, represented the Temecula Unified School District (District). Kimberly Velez, District's special education director, was also present.

Dana M. Smith, Attorney at Law and Deputy County Counsel for the County of Riverside, represented the Riverside County Department of Mental Health (CMH). She was accompanied by Dianne Radican, CMH's mental health services supervisor.

Student filed the Request for Due Process Hearing (complaint) on June 3, 2011. A continuance was granted for good cause on July 11, 2011. The matter was submitted and the record was closed on January 30, 2012.

## ISSUES<sup>1</sup>

1. Whether District denied Student a free and appropriate public education (FAPE) during the 2009-2010 and 2010-2011 school years by failing to:
  - A. reassess Student and conduct an Individualized Education Program (IEP) meeting at the outset of the 2009-2010 school year; and
  - B. implement the February 12, 2010, IEP by not timely referring Student to CMH.
2. Whether District and CMH denied Student a FAPE during the 2009-2010 and 2010-2011 school years by failing to:
  - A. complete Student's mental health assessment in a timely manner; and
  - B. offer appropriate mental health services and placement at the May 17, 2010, and June 24, 2010, IEP team meetings.

## FACTUAL FINDINGS

1. At all relevant times, Student resided within the boundaries of District with his Mother and older sister.
2. At the time of hearing, Student was a 15-year-old boy eligible for special education under the category of emotional disturbance (ED). Student does not have a relationship with his biological father, who has been absent since his birth. Student witnessed several years of domestic violence between Mother and Mother's husband (Stepfather). In 2004, Student witnessed Stepfather violently assault Mother for which Stepfather was arrested. Mother suffered blunt force head trauma. Following the incident, Student was diagnosed with Post Traumatic Stress Disorder (PTSD) and participated in counseling through the Victim's Crime Program. In January 2006, Student was diagnosed with attention deficit hyperactivity disorder (ADHD) (inattentive Type), conduct disorder, PTSD, and developmental coordination disorder. In addition to Student's psychological

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<sup>1</sup> The issues in the complaint were clarified at the prehearing conference, and reaffirmed with the parties the first day of hearing. At hearing, Student withdrew his claim that District and CMH denied Student a FAPE by failing to provide an individual authorized to offer mental health services and placement at the May 17, 2010, and June 24, 2010, IEP team meetings.

diagnoses, Student suffered from chronic allergies and asthma which resulted in respiratory illnesses, including frequent colds.

3. In spring 2007, when Student was in fourth grade in another school district, he was referred for an initial psychoeducational assessment. Student had a history of absenteeism and tardiness. During the 2006-2007 school year, Student was absent 27 times and tardy 11 times. When at school, Student had difficulties with task completion and peer relations. Student exhibited poor attention and focus, engaged in excessive talking, and demonstrated problems with following directions, working independently, and completing school tasks.

4. Student tested in the average and low average range on cognitive assessments. In addition, his social-emotional testing demonstrated that he had long-term and pervasive problems with relationships, inappropriate behavior and depression. The results of his social-emotional testing showed that Student qualified for special education under the category of ED. The results of his psychoeducational assessment also showed that Student's ADHD adversely impacted his education, and qualified him under the category of other health impaired (OHI). Student also demonstrated speech and language deficits.

5. On May 11, 2007, Student's initial IEP team determined Student was eligible for special education under the category of ED, as well as speech and language impairment (SLI). The team also developed goals for attendance and classroom participation.

6. The May 11, 2007, IEP team also referred Student to that county's department of mental health for an assessment. However, the referral did not progress because Student moved to District.

#### *2007-2008 School Year*

7. Student enrolled in District as a fifth grader in fall 2007. Student was placed in general education with resource specialist program (RSP) support and speech and language (LAS) services.

8. During the 2007-2008 school year, CMH supplied District's pupils with mental health services. Upon Student's enrollment in District, the elementary school psychologist contacted CMH to discuss his former school district's referral to its responsible county mental health agency. CMH informed the school psychologist that District would have to make a new referral to CMH, because Student's case was closed prior to his receipt of services from his former county mental health agency.

9. Student's pattern of high absenteeism and tardiness continued during the 2007-2008 school year. From the inception of the 2007-2008 school year until an IEP team meeting on February 20, 2008, Student had been absent 15 times, and tardy 24 times. The IEP team also noted Student's absences from his fourth grade year at his previous school

district to the date of the IEP. From November 2006 through the date of the IEP, Student had been absent a total of 42 times, and tardy 35 times.

*February 20, 2008 IEP*

10. A February 2008 progress report stated that Student's attendance had improved and that he was making satisfactory progress toward his academic and task completion goals.

11. Student's elementary school IEP team met on February 20, 2008 to discuss the steps required to initiate a new referral to CMH and obtain mental health services for Student. The IEP team acknowledged that Student's absences were a consequence of his reaction to stress, his desire to escape situations, his need for adult attention, and his way of protesting a grievance. The IEP team also acknowledged that Student's allergies contributed to his absences. District offered 12 sessions of designated instructional service (DIS) school counseling, and a new mental health referral. Student's eligibility for ED became his sole eligibility as the IEP team withdrew Student's SLI eligibility.

12. Until CMH accepted District's referral for mental health services, and as an interim measure, the school psychologist provided Mother with the contact information for her to secure counseling for Student under Medi-Cal. Mother committed to contacting CMH's psychologist, Dr. Brooks, to make an appointment for counseling using Student's Medi-Cal benefits pending receipt of IDEA-related services from CMH. There is no evidence that Mother accessed these other CMH services for Student.

13. The IEP team developed a goal to reduce Student's absenteeism by 50 percent, as well as a behavior support plan (BSP). The team determined that the special education teacher, general education teacher, and Parent would be responsible for this goal.

14. The IEP team offered Student placement in general education eighty percent of the time, with 60 minute sessions of pull-out RSP in the areas of reading, writing and math, four times a week.

15. Mother attended the February 20, 2008, IEP meeting telephonically. She notified District that she was in the process of moving and asked that the IEP be sent to her P.O. Box, not her home address, for her review and signature. Mother executed her consent to the IEP on March 6, 2008.

16. In or around April 24, 2008, District initiated a referral to CMH. Mother signed her consent for District to refer Student to CMH and release information to CMH. Mother's authorization remained effective for one year, or until April 24, 2009. CMH contacted Mother on September 30, 2008, at her post office box, to schedule an assessment.

17. There is no evidence that Student accessed any of the 12 sessions of school-based counseling services during the 2007-2008 school year.

*2008-2009 School Year*

18. Student's pattern of absenteeism continued after he matriculated to Temecula Middle School (TMS) as a sixth grade pupil in fall 2008. Mother requested an IEP team meeting to encourage Student's attendance by adjusting his schedule.

*December 15, 2008 IEP*

19. The IEP team met for Student's annual review on December 15, 2008, and in response to Mother's request. The team reported that Student missed school often due to his ED, and that his absenteeism caused him to fall behind academically. The IEP team agreed to a social-emotional goal which addressed his absenteeism by increasing his positive attitude about school. The IEP team also prepared goals to address Student's reluctance to complete assignments, turn them in, and stay on task. As a result of Student's absenteeism and failure to complete assignments, the IEP team kept the BSP in place that it had developed in the February 2008 IEP.

20. The IEP team agreed to adjust Student's class placement. At the beginning of the school year, District had placed Student in RSP advisement, RSP language arts, RSP social skills, and general education math, science and physical education (PE). Student's schedule was adjusted to add RSP math and study skills. At TMS, RSP-designated classes were often imbedded in the general education classroom with special education academic instructional assistance provided to Student individually or in a small group. Although the IEP stated that the RSP-designated classes were not part of the regular education environment, witnesses referred to these classes as "supported classes." Student would continue to participate in general education science and PE without support. In addition, Student would be transferred from one teacher that Student found too challenging, to one that would be easier for Student to understand.

21. Student was not physically or verbally aggressive to other pupils at school. The IEP team reported that Student had made friends and had become more social, but required a social skills class to help him develop appropriate behavior in social situations. There is no evidence that Student ever eloped from school, or from any class. Student's disability was manifest primarily in his task avoidance and failure to complete assignments.

22. Student's Mother consented to the December 15, 2008, IEP. This IEP was the last agreed-upon IEP for Student.

23. The December 15, 2008 IEP listed both Mother's residential street address, and her P.O. Box as her address. These addresses were repeated in each subsequent IEP.

24. On February 25, 2009, Student began the individual counseling originally set forth in his 2008 IEP with a District special education counselor. The counseling was scheduled to occur weekly for 30 minutes.

25. Despite the best efforts of Mother and the IEP team to adjust Student's schedule during the 2008-2009 school year, Student was absent almost one-third of the school year. Student was absent 53 days out of a total of 180 days of school. Forty-seven of the absences were excused, meaning Mother advised the school of Student's absences, and six were not. The attendance records demonstrated that Student continued to have absences and tardies after the IEP team modified his schedule. Student had approximately 16 full or partial day excused absences between the beginning of school and the December IEP team meeting. The remaining excused absences due to illness occurred after the December IEP team meeting. Between January 5, 2009, when pupils returned to school after winter break to the end of the school year on June 12, 2009, Student was absent due to illness approximately 21 times. Student was injured in spring 2009. During May and June, Student was absent 14 days due to illness.

26. As a result of Student's poor attendance and incomplete school work during the 2008-2009 school year, Student achieved a class rank of 456, out of a total of 458 pupils, and a grade point average of one out of a maximum of four.

27. Student's poor attendance also contributed to his failure to complete the twelve (12) sessions of counseling with the school counselor offered in the February 2008 IEP. Between February 25, 2009, and the end of the school year, Student completed six counseling sessions. The counselor had attempted to meet with Student on 10 other occasions, without success, due to Student's absences from school.

28. At hearing, Mother testified that Student had problems with attendance during sixth grade, especially before his schedule was adjusted by the IEP team. The classes were too hard for him. When she first spoke with the counseling office when he arrived at TMS, they did not seem to know that he had an IEP. She requested an IEP team meeting so that he could obtain an easier schedule. According to Mother, when Student switched from more difficult teachers to classes with specialized academic support, Student engaged in less absenteeism and tardiness.

29. Mother was familiar with the IEP process. In addition to attending Student's IEPs since 2007, she attended IEP meetings on behalf of his older sister, a high school pupil.

30. Mother admitted to cognitive impairment which impacted her memory, as a result of blunt force head trauma from her assault in 2004. She admitted to short term memory challenges, occasional long-term memory deficits, and generally challenges coping with her daily responsibilities. Her testimony regarding general events and circumstances was given great weight based on her demeanor, apparent candor, and consistency with documentary evidence or other witness testimony. Her testimony was given less weight when it conflicted with documents or other testimony, given her admitted impairment.

*2009-2010 School Year*

31. Student's seventh grade, 2009-2010, school year commenced on August 17, 2009. Student returned to TMS at the beginning of the school year.

32. Student's daily schedule began with an advisement period, which was a short homeroom period where announcements were made. Lance Yelton, who was a special education teacher and Student's case manager, conducted Student's advisement period. Student was then required to complete an eight period school day. He was scheduled for first period physical education (PE), second period elective, referred to as an exploratory, third period social science, fourth period general advisement, which was a reading period for all pupils, fifth period pre-algebra, sixth period lunch, seventh period language arts, and eighth period science. Mr. Yelton was not assigned to any of his other classes. One of Student's assigned teachers was the same one Student found too challenging in the previous year.

33. Student was defiant and did not respect Mother's authority. His defiance was not limited to school matters, but increasingly dominated their relationship in other matters. Student was also aggressive towards Mother by shouting within close range of her. Mother's inability to command authority was compounded by Student's size. At 13 years of age, Student was over six feet in height and weighed over 200 pounds.

34. Mother worked full-time as an assistant in a hospital from 2 p.m. through midnight, and was available each morning to prepare Student for, and drive him to, school. However, Mother could not always command Student to attend school. At the beginning of the 2009-2010 school year, Student attended the first week of school. However, in the second week of school, he attended four of five school days the second week, with tardies in early morning advisement the first two school days, and a tardy during first period the second school day. Student obtained an excused absence the fourth school day. Student attended the four available school days the third week of school, except for an excused absence one day for two periods of school, for advisement and first period. Mother kept in regular contact with school staff about Student's attendance status. As evidenced by TMS's attendance report for Student, Mother contacted the school most days to report Student's absences.

35. Student continued to resist Mother's attempts to get him to school. On one occasion, Mother succeeded in driving Student to school, but upon their arrival at the school, Student refused to leave the car. Mother left Student in the car and went into TMS's administrative office so that the staff could assist with getting Student out of the car and into class. The staff refused to assist, and Mother took Student home. The staff did not contact Mr. Yelton.

36. During the fourth week of school, Student was excused for illness on the Tuesday immediately following a Monday school holiday, and on Friday, was cited for truancy for missing advisement, and received a tardy for first period.

37. Student's absenteeism accelerated after the fourth week of school, beginning September 14, 2009. Student was excused for illness three of five school days that week. Student was tardy the first day of the following week, September 21, 2009.

38. Mother did not request an IEP team meeting, but by September 21, 2009, she had contacted Student's counselor, and met with her in her office. Mother requested that the counselor adjust Student's schedule so that it would be similar to the schedule that that he had the previous year after the IEP team met in December 2008. Mother wanted Student to participate in a class supported by a special education instructional assistant first period to help him navigate his academics. Mother wanted Student to be transferred from the classroom teacher that had been too difficult for him to follow during fall 2008.

39. On September 21, 2009, the school counselor confirmed in an email that District did not offer first period academic classes with special education aide coverage during first period. The school counselor copied the e-mail to Mr. Yelton.

40. Mr. Yelton, who testified at hearing, did not communicate with Mother during fall 2009. Mr. Yelton, who was newly assigned as Student's special education case manager during the 2009-2010 school year, was an experienced special education teacher, with 21 years experience. At hearing, he spoke with candor and honestly stated whether he recollected or did not recollect events. He explained that Student's counselor never asked him to respond to Mother's request to adjust Student's schedule. He did not recall the email from Student's counselor.

41. Student stopped attending school the fifth week of school, on September 22, 2009.

42. Between September 22, 2009 and October 13, 2009, Student was excused for illness. Student's absences were recorded as unverified from October 14, 2009 through October 16, 2009.

43. In an attempt to find a solution to Student's refusal to attend school, Mother enrolled Student in a charter school on October 16, 2009, and on October 19, 2009, withdrew Student from District. Mother provided the charter school with Student's IEP. There is no evidence that the charter school was within the District.

44. Mother selected the charter school because it did not require Student's attendance every day and utilized a strong home school component. Class texts were downloaded on Student's computer and assignments could be accessed and completed on-line. Student was required to attend the school site three times per week. Consistent with his pattern of defiance to his Mother, Student only attended two days of class the first week, and Mother could not convince him to attend again. Consistent with his pattern of task avoidance, Student also failed to complete the assigned class work. Student spent most of his day at home, except when he left the house during the day, in defiance of his Mother's instructions.

45. District's winter holiday schedule included one week for Thanksgiving, November 23 through 27, 2009, and approximately two weeks for winter break, December 18, 2009 through January 1, 2010.

46. Student's enrollment in the charter school ended on or about December 9, 2009.

47. In early December, 2009, Mother retained an advocate, Fred Marasco, to assist her with Student's educational options. Due to Mother's cognitive impairment, she relied extensively on the advice of her family, particularly her brother, Student's uncle (Uncle), to advise her on educational decisions for Student. Uncle worked with Mr. Marasco to advise Mother about Student's educational options. Mr. Marasco, who provided expert testimony at hearing, interviewed Mother, and reviewed Student's educational records, and previous evaluations, including the initial psychoeducational evaluation of 2007. Mr. Marasco has a bachelor of arts in psychology, and a masters of arts in psychological counseling. For 33 years, he was the school psychologist for the Sweetwater Union High School District in Chula Vista, California. In that capacity, he assessed students, managed special education programs and the teachers involved in those programs, provided direct counseling to pupils, referred pupils to the local county mental health agency for assessments and services, and participated in IEP's. Based upon his experience, he was qualified to render an opinion on District's obligations to offer Student a FAPE, or make referrals to CMH. Mr. Marasco also testified as a percipient witness. As a percipient witness, he demonstrated a better recollection of events than TMS staff, and his testimony, when compared to their testimony, was given more weight to the extent it was consistent with the supporting documentation. Where Mr. Marasco's testimony regarding the IEP team meetings conflicted with the supporting documentation, or other percipient witnesses at IEP team meetings, it was given less weight, since Mr. Marasco was provided an opportunity to review the IEP team minutes before they were finalized.

48. On January 8, 2010, TMS's assistant principal, Mr. Yelton, Mother, Student and Mr. Marasco met for the purpose of discussing Student's attendance. Mr. Marasco's goal was to encourage Student to attend school by making him comfortable in the school environment. From his discussions with Student, Mr. Marasco shared that Student's academic challenges and resulting low confidence contributed to his feeling of being overwhelmed. At that meeting, Mr. Marasco and Mother spoke of building a relationship between Student and one adult, preferably his special education case manager, Mr. Yelton. They also initiated discussion about reducing the number of classes Student was required to attend, assigning him classes with supportive teachers that understood his needs, like Mr. Yelton, and increasing the number of classes with special educational instructional support. Student came prepared with proposed schedule modifications. The assistant principal advised that any modifications to Student's program in the form of more restrictive classes would have to be made by the IEP team. Student then agreed to return to TMS, and Mother re-enrolled Student in District and TMS on January 11, 2010. Mr. Marasco collected all the necessary textbooks for Student.

49. Despite his commitment to attend school, Student never attended TMS after January 11, 2010.

50. On January 25, 2010, Mr. Marasco wrote a letter to the assistant principal requesting an IEP team meeting to discuss Student's educational placement. He acknowledged that it would be difficult to assess Student's needs due to his absence from school, but referred the school psychologist to his previous assessment. By that time, Mr. Marasco had concluded that it would be difficult for District to identify an appropriate placement for Student and stated his doubts about an appropriate public school placement in his letter. Mr. Marasco sent a copy of his communication to Mr. Yelton, and District's school psychologist, John Kroncke.

*February 12, 2010 IEP*

51. On February 12, 2010, District convened Student's IEP team meeting as part of its annual review and to respond to Mother's concerns. All necessary IEP team members were present including: Mother, Student's aunt, Mr. Marasco, Mr. Kroncke, Mr. Yelton, the assistant principal, and Student's seventh grade general education language arts teacher. Student's seventh grade general education teacher confirmed that in the short time Student attended school, he did not engage in class and did not complete assignments despite instructional aide assistance. Student's behaviors at school were reviewed. District's team members confirmed that Student was not aggressive or disruptive in class and did not exhibit any behavior problems during the school day.

52. Mr. Marasco reported on Student's emotional and behavioral status based upon his review of records, his discussions with Mother, and his one-on-one interaction with Student. Student was not receiving any form of therapy, and he was not taking any medication. Mr. Marasco informed the IEP team that Student exhibited aggressive behaviors at home, and characterized Student's behaviors as "troublesome" and "dangerous." Mr. Marasco did not provide any further explanation of Student's behaviors at home.

53. The IEP team discussed the need to reassess Student. Student's triennial psychoeducational assessment was due in May 2010. Student had not been reassessed since his initial psychoeducational assessment in May 2007. Mr. Kroncke advised the IEP team that a new psychoeducational assessment was required in order to establish Student's current present levels of performance, and to develop appropriate goals and services, so that District could make an offer of FAPE. The IEP team agreed to advance the triennial assessment of Student and to prepare an assessment plan for Mother's signature that day. Mr. Kroncke explained the assessment process and timeline to Mother.

54. Mr. Marasco requested a mental health referral to CMH. The IEP team agreed that based upon Student's participation in school-based counseling, that District could refer Student to CMH. District also agreed to initiate the CMH referral "concurrent" with its triennial psychoeducational assessment of Student.

55. The IEP team discussed the mechanics of conducting the triennial psychoeducational assessment given the challenges in getting Student to school. The team decided that the assessment would be scheduled at District, but it could take place, if needed, at District's office, or at Student's home.

56. The IEP team discussed Student's schedule to encourage Student to come to school. Mr. Yelton proposed a daily schedule that provided Student more support and contact with Mr. Yelton. Mr. Yelton would continue as the advisement instructor, and after physical education period, Student would return to Mr. Yelton's second period social studies class. Mr. Yelton would be available for Student again for the daily study period and his math concepts class. Student would still attend his language arts class, but would end his day with reading concepts or an elective. Student would no longer be required to attend pre-algebra, or science. Student's proposed daily schedule was not made part of the IEP.

57. The IEP team discussed Student's placement. Other than the proposed daily schedule, Student's placement remained unchanged from the previous IEP. Mr. Marasco stated that Student required a "treatment program," and told District of Mother's intent to withdraw Student from District, unilaterally place Student in an "appropriate" facility, and seek reimbursement, if necessary. Mr. Marasco did not further elaborate on his desired placement for Student. Mr. Kroncke understood a treatment program to encompass services outside of the school day, or services at a school site. Based upon Mr. Marasco's notification that Mother was considering a unilateral placement, Mr. Kroncke believed that Mr. Marasco was looking for a placement other than a public school placement.

58. The February 12, 2010, IEP contained a goal to address Student's absences due to his ED. The goal required Student to demonstrate through using positive reinforcement, a positive attitude about school, and to work on task. The goal was to be measured by Student's work product, and teachers' records, and was to be administered by Student's special and general education teachers, Student, and Mother. The IEP did not include a BSP.

59. At hearing, Mr. Kroncke explained that a BSP was not prepared because the purpose of the February 12, 2010, IEP team meeting was to discuss Student's triennial reassessment and refer Student to CMH. Consistent with his statement that a FAPE offer could not be made at the February 12, 2012 IEP team meeting, Mr. Kroncke maintained that a BSP would not have been appropriate until he reassessed Student and CMH made its recommendations. Mr. Kroncke stated that the necessity for a BSP would depend on Student's placement.

60. The February 12, 2010, IEP, like the December 2008 annual IEP, included two addresses for Mother, her street address, and a P.O. Box.

61. Mother did not consent to the February 12, 2010, IEP.

62. On February 12, 2010, Mother signed the necessary consent form to refer Student to CMH, as well as to release Student's information required to initiate the referral. The consent form listed Mother's P.O. Box as her address.

63. Mr. Kroncke prepared the referral packet following the checklist of required documentation provided by CMH. Mr. Kroncke provided the parent consent and release form, forms setting forth Student's profile, District's required pre-referral interventions, the February 2008 IEP containing the IEP team's statement of referral, social/emotional goals relevant to the referral, and attendance records from 2008 through 2009. When outlining District's pre-referral interventions, Mr. Kroncke reported that Student's absences prevented him from completing counseling sessions despite District's repeated efforts to provide the services, and that Student needed more intensive intervention. Mr. Kroncke also reported to CMH Student's ED eligibility, his personal traumatic and school attendance history, his isolation from peers and adults at school since October 2009, his Mother's inability to get Student to attend school, and Student's failure to complete the assigned work when Mother unilaterally enrolled Student in the charter and home school program. Mr. Kroncke also reported that Student could not complete tasks or work independently as evidenced by his failure to attend school or complete assignments at home. Also, Mr. Kroncke reported that Student's behavior at school was generally appropriate when he attended in fall 2009, that he was generally cooperative with the adults at school, and that he had friends when he attended school.

64. In the CMH referral packet, Mr. Kroncke provided CMH with information about Student's placement in general education classes with resource support for math and language arts, and his accommodations. He also advised CMH that District was in the process of preparing an updated psychoeducational assessment, and reported that the IEP team agreed that the referral to CMH would be made concurrently with District's updated assessment, due to the "critical" nature of the referral.

65. Mr. Kroncke was required to provide CMH with Student's most recent assessments as part of the CMH referral packet. Although Mr. Kroncke committed to making a concurrent referral, based on his experience with CMH, he wanted to complete the triennial assessment so that CMH would have the most recent referral information. In his experience, CMH had rejected referrals if the information was incomplete, or if a more recent assessment was pending. Because Student's assessment data was almost three years old, Mr. Kroncke wanted to provide CMH with the latest assessment data.

66. Mr. Kroncke made several attempts to schedule Student's psychoeducational assessment at TMS. He contacted Mother during the week of February 15, 2010 and offered Mother several appointment options at TMS. Mother agreed to bring Student on February 26, 2010 at 9:00 a.m. To convince Student that he should cooperate with the assessment, Mother threatened him that he would be removed from public school and placed in a nonpublic school (NPS). Student still would not cooperate with Mother and did not attend the assessment at TMS.

67. During the time period that Mother attempted to convince Student to cooperate with Mr. Kroncke's assessment appointment, Mother and Mr. Kroncke cooperated to arrange times and dates that did not conflict with her Mother's other obligations. Mr. Kroncke did not question Mother's efforts to obtain Student's cooperation.

68. Around this time, Mother had become impatient with CMH's process, as she had expected to receive paperwork from CMH. On February 26, 2010, Mother asked Mr. Marasco whether he had received any paperwork from CMH. He had not.

69. Mother and Mr. Kroncke agreed to reschedule the appointment for March 1, 2010. Student did not appear for his assessment.

70. On March 5, 2010, Mr. Marasco requested in writing that Mr. Kroncke assess Student at home, as he committed to do if Mother could not get him to school. Mr. Marasco reminded Mr. Kroncke that Student had not returned to school and advised that Student showed evidence of "deterioration," in the form of depression and oppositional behavior at home. Mr. Marasco reiterated Mother's intent to withdraw Student from District, and seek reimbursement from District for her unilaterally placing him in an "appropriate" setting. He also expressed concern that further delay would also result in a delay in CMH's assessment. As an experienced school psychologist involved in mental health referrals, he was aware that it was preferable, although not required, to provide the most current information through the date of the referring IEP team meeting.

71. In response to Mr. Marasco's March 5, 2010 letter, District immediately scheduled and notified Mother of an IEP team meeting for March 15, 2010. Mother advised District that she could not attend that day.

72. Mr. Kroncke and Mother succeeded in arranging new assessment appointments at Student's home.

73. Mr. Kroncke began, but did not complete, his assessment of Student at home on March 10, 2010.

74. On March 11, 2010, Mr. Kroncke delivered the referral package to District's offices for delivery to CMH. All CMH referrals were submitted through District's central administrative offices, and not through TMS.

75. Mr. Kroncke arranged with Mother to complete his assessment of Student at home on March 15, 2010. He also scheduled Mr. Yelton to administer Student's academic assessment at his home that day as part of Student's triennial psychoeducational assessment. Mother notified Mr. Kroncke by email at two o'clock in the morning that she had to cancel the appointments because she was required to work that morning.

76. On March 16, 2010, District's administrative office approved the CMH referral packet prepared by Mr. Kroncke. The administrative office listed Mother's

residential street address on the cover sheet. The consent form signed by Mother listed her P.O. Box as her address.

77. Student's at-home assessments with Mr. Kroncke and Mr. Yelton were completed on March 18, 2010. Mr. Kroncke and Mr. Yelton were able to develop a rapport with Student during their assessment of him. Mr. Kroncke engaged in spontaneous conversation with Student, and Student willingly responded to his questions. Student was cooperative throughout their testing, was attentive and made a good effort to complete the tasks.

78. On March 21, 2010, CMH received the referral packet from District. The referral packet included the February 12, 2010, IEP, but did not include Mr. Kroncke's psychoeducational assessment report.

#### *Psychoeducational Assessment Report*

79. Mr. Kroncke's 18 page psychoeducational assessment report was completed sometime on or after March 21, 2010. The report was not dated and Mr. Kroncke did not recall the exact date he completed the report. Mr. Kroncke's report was comprehensive. In his report, he meticulously summarized Student's medical, family, educational, discipline and assessment history. As part of Student's educational history, Mr. Kroncke accurately reported Student's history of absenteeism leading to Mother's withdrawal of Student from District and her unsuccessful attempt to engage Student in the charter school home school program. He reported that Student's teachers during the first month of school noted Student was generally disengaged from class and did not complete assignments. He reported that the primary concern was attendance, class participation, and task completion.

80. Mr. Kroncke administered a full range of academic and cognitive assessments. He administered the Wechsler Intelligence Scale for Children – IV to assess Student's overall cognitive ability, and found that Student's overall cognitive ability was in the low average range for reading and written expression and within the borderline range for math. Mr. Kroncke administered the Bender Gestalt II to assess Student's visual perceptual and visual memory skills, and found that Student scored in the average range for visual perceptual and visual memory skills, and in the low average range for fine motor coordination. He used the Test for Auditory Processing Skills 3 (TAPS 3) to measure Student's auditory perceptual processing skills, and found that Student scored overall in the average range with relative strengths in comprehension and reasoning, and a relative weakness in short term auditory memory. Mr. Kroncke administered the Test of Visual-Perceptual Skills 3 (TVPS 3) to measure Student's visual perceptual processing skills, and found that Student measured average on most subtests. Based upon his scores, Mr. Kroncke concluded that Student performed better with visual learning, and nonverbal analytical tasks, and did not perform as well on tasks requiring verbal or expressive language skills or auditory memory skills.

81. Mr. Kroncke referenced Mr. Yelton's academic assessment. Mr. Yelton administered the Wechsler Individual Achievement Test II (WIAT-II), including the reading composite, math composite and written language composite. Student tested within the low average range on broad measures of reading and written language. He tested in the borderline range for math; math computation was a particular weakness.

82. Mr. Kroncke assessed Student's social emotional behavior with several assessments. He used the Piers-Harris Children's Self Concept Scale 2, where Student reported his self-image. In the areas of behavior, physical appearance, anxiety, and popularity, Student reported average feelings, and reported high average feelings in the areas of general happiness and satisfaction. Student reported below average feelings regarding his intellect and school status. Student denied excessive stress or anxiety about school, but he did not see himself as a successful pupil, and lacked confidence in his intellectual and academic abilities. Student measured in the average range on the Reynolds Adolescent Depression Scale 2, which included six critical items considered most significant for indications of depression.

83. Mr. Kroncke administered the Connors Rating Scale to Student and Mother to measure the behavior characteristic of ADHD which impacted learning, including executive function, aggression, peer relationships, and family relationships. Mother's scores and Student's scores were opposite in areas of physical aggression and interpersonal relationships. Student did not see himself as aggressive, and saw his relations with his family as typical. Student and Mother agreed that Student had significant difficulty with attention, hyperactivity/impulsivity and learning. The Connors Rating Scale generally include teacher ratings, but Mr. Kroncke did not secure any, because Student had not been observed at school since September 2009.

84. Mr. Kroncke administered the Behavior Assessment System for Children 2, (BASC2) to measure externalized behavior, internal emotions, and social adaptive skills. Mother and Student provided ratings that opposed each other. Mother's ratings profiled Student's behaviors, adaptive skills, and social skills as clinically significant. To Mother, Student was sad, lonely, aggressive, and without social skills. Mother reported that Student sometimes said, "I want to kill myself," and often said, "I want to die, or wish I were dead." To Student, his behaviors and skills were typical of his peers, with the exception of his at-risk scores for somatization and test anxiety.

85. Mr. Kroncke, who interviewed Mother, included Mother's perceptions of Student in his report. Mother advised, among other things, that Student made suicidal statements, was unreasonable, challenged authority, was argumentative, disrespectful to her, and blamed her for his behavior. She also stated that he violated curfew, bullied her and his sister, set fires, and destroyed property.

86. Mr. Kroncke also interviewed Student and reported Student's reasons for his absenteeism. Student stated that he stopped attending school because he did not like some of his classes and thought there was too much work. He stated that he was ready to go back to

school and he wanted to go back to TMS. He was willing to work with his school counselor to change some of his classes and teachers, and review his scheduling options.

87. Mr. Kroncke concluded that Student's educational performance was adversely impacted by his long history of behavioral and emotional factors, primarily as a result of Student's feelings of inadequacy, low confidence in his scholastic abilities, and excessive anxiety when facing stressful demands. Mr. Kroncke reasoned that Student withdrew and avoided situations where he felt inadequate, such as when faced with the demands of homework and tests. Student was cooperative in class, but passively resisted, by failing to complete assignments or participate in classroom discussions. Student's absenteeism and passive resistance to assignments were poor coping mechanisms developed over time to avoid stress from school. When he perceived that school was too demanding, he avoided it by refusing to attend.

88. Mr. Kroncke also concluded that the family dynamic at home had evolved over time and resulted in behaviors that were different than behaviors at school. At home, Student did not respond to his Mother's authority, and chose to be defiant and aggressive with Mother to avoid situations he did not want to face.

89. Based upon his interview with Student and Mother and their respective responses to the Connors and BASC-2 rating scales, Mr. Kroncke reasoned that despite Student's denial, he evidenced depression from his social withdrawal, agitation at home, aggressive outbursts to Mother, and statements that he wanted to die.

90. Mr. Kroncke concluded that Student was socially isolated at the time and wanted to return to school, but did not know how to take the first step on his own. He emphasized that mental health services were required for Student to pursue his education and experience success at school.

91. Mr. Kroncke made several proposals for the IEP team's consideration to advance Student's access to his education. He recommended continued specialized academic support in the areas of language arts and math to support noted weaknesses in his skills in spelling, writing, and math calculation. He recommended a small group instructional environment to ease his transition back to school and to keep distractions to a minimum so he could sustain attention. He recommended mental health intervention to assist him in developing more effective coping skills, based on guidance from CMH's assessment as to appropriate mental health services. He advised the IEP team that CMH services would also be needed to address Student's depression, particularly in view of Mother's report of his suicidal threats. He recommended that the IEP team develop short and long term educational goals with Student to provide him with greater meaning and purpose in his academic pursuits. He recommended visual instructional strategies to support his strength as a visual learner. Finally, he recommended a very supportive learning environment where Student could receive positive reinforcement and opportunities for academic success, which would facilitate his attendance.

92. At hearing, Mr. Kroncke elaborated on what he learned from his psychoeducational assessment of Student. Prior to his psychoeducational assessment, he merely understood that Student did not like to come to school. After his psychoeducational assessment, he fully appreciated that Student's avoidance of school was part of a maladaptive response pattern of avoiding and withdrawing from situations which caused him stress. He clearly understood that Student's maladaptive response to school was related to his ED.

93. Mr. Kroncke has 30 years experience as a school psychologist. He was a credible witness, doing his best to answer questions directly, and without obfuscation, based upon his recollection. It was clear that he was interested in serving Student and obtaining necessary CMH services for him. He demonstrated that he understood the range of placements available to Student. However, contrary to his demonstrated expertise, there was a marked omission of any discussion at the IEP team meetings of how to get Student to attend school, or how to provide him an education until he was willing to attend.

94. On March 23, 2010, Linda Brooks, psychologist and CMH clinical therapist, prepared a letter for Mother notifying her of CMH's receipt of District's referral, and requested Mother to call to arrange an appointment for Student's mental health assessments. In her letter, she stated that Mother must contact CMH no later than April 23, 2010, or the case would be closed. Ms. Brooks also prepared a parental consent form which Mother was required to sign and return to CMH to initiate the assessment.

95. Ms. Brooks' communication did not reference Mother's address. CMH maintained a copy of Ms. Brooks' March 23, 2010 letter, and the parental consent form in its records, but it did not maintain a copy of the mailing envelope, or any other mailing record.

96. On March 25, 2010, District notified Mother of a School Attendance Review Board (SARB) hearing to consider whether Student and Mother were in violation of juvenile or criminal laws requiring school attendance. The SARB letter was directed to Mother's street, but had the wrong house number. Despite this, Mother received the letter.

97. Mother expected to receive all her communications, including communications from CMH at her P.O. box. Although she had a mail box at her residence, which was located approximately one hundred feet from her front door, she had a standing instruction with the United States Postal Service mail station that routed her mail, to forward all mail sent to her street address to her P.O. box. She never checked the mailbox.

98. District scheduled IEP meetings in April to review Mr. Kroncke's assessment. District rescheduled an IEP team meeting originally set for April 20, 2010, to April 27, 2010. However, Mr. Kroncke canceled the April 27, 2010, IEP team meeting so that one IEP team meeting could be held when CMH completed its assessment.

99. In or around April 2010, Student's older sibling began attending an out-of-state residential treatment facility (RTC), the Provo Canyon School (Provo). Provo was a "lock-down" facility, meaning pupils' movements were restricted and their mobility was

strictly limited to assigned areas of the facility. Provo provided education and mental health therapy.

100. On April 29, 2010, Ms. Brooks sent a letter to Mother and District notifying them that Mother had not responded to her March 23, 2010 letter, and, therefore, CMH was unable to complete the assessment. The letter was addressed to District, but Mother separately received this letter.

101. In response to Ms. Brook's letter, Mr. Marasco contacted Mr. Kroncke that same day and requested an "emergency" IEP team meeting.

102. When Mr. Kroncke learned from Mr. Marasco that Mother had not signed the necessary consent forms from CMH, Mr. Kroncke personally delivered the consent forms to Mother.

103. On May 2, 2010, Uncle expressed his concern to Mr. Marasco about the ability of District and CMH to develop a program before the end of the school year to address Student's needs and absenteeism. He directed Mr. Marasco to contact CMH and District to find out what was going on and to advise the family of their options.

104. Mother signed the consent forms on May 3, 2010.

105. Upon receipt of Mother's consent, Ms. Brooks worked with Mother to schedule the CMH assessment. CMH generally conducted its assessments at its offices. Mother agreed to bring Student to CMH on May 13, 2010, but despite her efforts, Student refused to leave home to attend.

*May 17, 2010 IEP*

106. In response to Mr. Marasco's request, an IEP team meeting was held on May 17, 2010 to discuss the results of Student's triennial assessment. All necessary team members were present including Mother, Uncle, Mr. Marasco, Mr. Kroncke, Mr. Yelton, a District administrator, and Student's assigned general education teacher. Mother had an opportunity to ask questions about Mr. Kroncke's assessment. Mr. Marasco asked about the status of CMH's assessment and was told that the assessment would proceed within the week, and that upon completion, another IEP meeting would be held.

107. The IEP team discussed the need to get Student back to school. Mr. Kroncke reported Student's interest in returning to TMS. Consequently, District IEP team members offered Student more support in special education classrooms. Specifically, District offered specialized academic instruction in language arts, math, science and social studies, in separate classrooms. Student would remain in general education for PE and an elective. District did not offer extended school year services (ESY).

108. The IEP team could not assess Student's progress on his goals as he had not attended school since fall 2009. However, the team did develop a range of academic goals consistent with his December 2008 IEPs in areas of academic weakness that persisted according to Mr. Kroncke's assessment. In addition, the team developed an attendance goal, styled as a vocational goal, to address his baseline absence from school since September 2009. The vocational goal required Student to improve his attendance by missing no more than one day of school per month as measured by attendance records. Only Student and Mother were responsible for this goal. The IEP did not include a BSP. District offered twelve school-based 30 minute counseling sessions, to be held monthly.

109. Mother did not consent to District's May 2010 IEP offer.

110. Mother rescheduled the assessment with Ms. Brooks for May 19, 2010. However, Mother could not get Student out of bed to attend his assessment with Ms. Brooks. Ms. Brooks left messages for Mother to arrange a meeting to complete Mother's portion of the assessment on May 24, 2010 or May 25, 2010. Ms. Brooks offered to complete Student's portion of the assessment at TMS, and in advance of the assessment, to speak with Student on the telephone to reduce his anxiety about the assessment.

111. On May 19, 2010, Ms. Brooks sent a letter to Mother summarizing her efforts to secure Student's assessment. The letter was addressed to Mother's residential address, not her P.O. box. There is no evidence that Mother did not receive the letter. That same day, Mother contacted Mr. Kroncke and requested his assistance in getting Student assessed by CMH. Mr. Kroncke assured Mother that he would contact CMH to discuss ways to complete Student's assessment.

112. Ms. Brooks interviewed Mother on May 24 and 25, 2010.

113. Beginning on May 25, 2010, Ms. Brooks prepared a CMH form document which summarized her findings, and the information she relied upon to make her findings, including Student's diagnosis, his educational and medical history, and her interviews.

114. Ms. Brooks listed Mother's correct residential street address in the space provided for the client address. The CMH document specifically prohibited the assessor from listing a P.O. box.

115. On May 26, 2010, CMH notified District to set an IEP team meeting to review its assessment.

116. Ms. Brooks arranged to assess Student at TMS on May 27, 2010. Student agreed to be transported to the CMH assessment by Mr. Kroncke. Mr. Kroncke went to Student's home and drove him to TMS. Kroncke drove alone in the car with Student. Mother followed Mr. Kroncke and Student to the appointment in her car.

117. The 2009-2010 school year ended on June 11, 2010. There were approximately 180 school days in the 2009-2010 school year. Of those days, Student was enrolled a total of 84 days. Student was present 20 days, or 24 percent of enrolled days. Student was absent 64 days, or 76 percent of enrolled days.

*CMH Assessment Report*

118. On June 15, 2010, Ms. Brooks prepared Student's mental health assessment report. Her report of interviews with Mother and Student was generally consistent with their statements made to Mr. Kroncke and memorialized in his psychoeducational assessment report. Mother reported that Student made suicidal statements, but added that the statements were not recent. Mother did not report that Student ran away from home, or was otherwise a flight risk. Mother did not provide any information to Ms. Brooks that suggested that Student was a danger to himself or others. Mother's report of Student's health history was also similar to her report made to Mr. Kroncke.

119. The CMH report noted that as of the February 2010 IEP meeting, Mother stated an intention to residentially place Student. Ms. Brooks spoke to Mother about her statement and Mother confirmed that she intended to place Student residentially in order to help him receive an education.

120. During Student's mental health assessment with Ms. Brooks, he admitted to depression. Student used to enjoy sports and excelled earning "most valuable player," but lost interest in sports. He reported that his depression began after an accident during spring vacation in 2009, when a metal peg lodged in his knee after falling from a dirt bike. He required emergency room medical treatment and walked with difficulty for several weeks. Ms. Brooks concluded that he had symptoms of anhedonia, the loss of interest or pleasure in daily activities.

121. Ms. Brooks found Student to present as anxious and shy, but alert, cooperative and thoughtful. He was cautious at first, but after spending time with her, his anxiety decreased, they developed a rapport, and he was more forthcoming about his feelings of depression. Ms. Brooks was careful not to pursue Student's early family history to avoid Student becoming anxious.

122. Ms. Brooks did not observe any suicidal ideation, plan or intent. She did not observe a thought disorder. She considered his judgment and insight to be fair to poor.

123. Ms. Brook's report did not specifically reference Mr. Kroncke's most recent psychoeducational assessment, and there is no evidence from her report or testimony that she considered any document prepared after the February 12, 2010, IEP. From her report it was clear that Ms. Brooks reviewed the following documents from District: the CMH referral form Mr. Kroncke prepared, Student's sixth and seventh grade attendance records, and the February 12, 2010 IEP.

124. Ms. Brooks obtained records from Student's medical doctor and one mental health care counselor who provided services to him in 2005. The mental health care counselor's records established that Student received some treatment in 2005, but Student's treatment was not completed because he frequently missed appointments. Mother's participation was reported as minimal.

125. Ms. Brooks obtained the names of several additional individuals that had been named as Student's past mental health providers, but did not have their records at the time of her assessment. On May 25, 2010, she requested records from four health providers, and requested that Mother extend the timeline for her report so that she could consider these records. Mother refused to agree to a further delay of the CMH assessment report.

126. Ms. Brooks recommended a treatment plan that focused on: communication skills to promote respect and compromise in the home environment; school attendance on a daily basis; work completion and the maintenance of a "C" grade within six months; behavior interventions to reduce symptoms of depression by decreasing negative self-talk and core beliefs; calming techniques to manage realistic demands and empower Student in unfamiliar situations by decreasing anxiety, and fearful thinking; a regime of daily medication prescribed by a psychiatrist to reduce symptoms of anxiety and depression; and increasing client's physical activity to increase self-esteem.

127. Ms. Brooks, who provided testimony at hearing, is an experienced clinical therapist with a doctorate in clinical psychology with an emphasis on family psychology. She is also a licensed marriage and family therapist. Ms. Brooks has been employed with CMH since 1994. During 2010, she was assigned by CMH to its Temecula mental health clinic where as part of her responsibilities she conducted school-referred mental health assessments. Ms. Brooks testimony, together with her assessment and written documentation, demonstrated that she thoroughly reviewed and understood Student's profile, approached Mother and Student with compassion, developed a rapport with them, and prepared a report that considered Student's needs, but was consistent with CMH's obligations. As such, Ms. Brook's testimony was given great weight in considering whether CMH fulfilled its obligations under the IDEA.

128. Ms. Brooks consulted with her supervisor before finalizing her report. Her supervisor reviewed the initial referral information and met with Ms. Brooks to review her report. Ms. Brooks' supervisor approved and signed Ms. Brooks' report.

129. Ms. Brooks advised her supervisor of Mother's interest in a residential placement. Following CMH protocols, as an assessor assigned to CMH's local mental health clinic, Ms. Brooks was authorized only to recommend outpatient services. Authorization to recommend residential placement could only be made by CMH's children's case management division where clinicians have specialized knowledge of residential placement options. Ms. Brooks' supervisor approved her recommendation for outpatient services. If Mother rejected CMH's offer of outpatient services at the IEP to discuss the assessment, Ms.

Brooks was directed by her supervisor to refer Student's case to CCM to review it for residential placement.

130. CMH's Temecula mental health clinic provided school-based mental health services, but also provided other services to the same pupils and their families that were not funded as IDEA services. Student and his family qualified for these other, non-IDEA services under Medi-Cal. Following CMH protocols, it was Ms. Brooks' practice to review the scope of CMH's Temecula health clinic services with families during the assessment process, and she did so with Mother. Ms. Brooks took particular note of Mother's statement that she intended to place Student residentially. Ms. Brooks briefly reviewed with Mother the in-home services available to the family that could assist in keeping Student in his home environment. CMH offered services for the family that could be delivered in the home. For example, Ms. Brooks informed Mother that she could take advantage of therapeutic behavioral services (TBS) which were provided by a team which included a behavioral coach. The TBS team could visit with the family once a week and actively work with them to improve their relationships. As part of TBS, a behaviorist would model for Mother appropriate interactions with Student. Ms. Brooks described a variety of other services provided to parents and their families in their home which focused on supporting the family relationship, including wrap-around services and multi-dimensional family therapy, which were designed around the families' needs, and included a range of family and individual therapy services. Ms. Brooks provided Mother with a CMH handbook which described service options.

*June 24, 2010 IEP*

131. On June 24, 2010, the IEP team convened to discuss the CMH assessment report. IEP team members included Mother, Mr. Marasco, Uncle, Mr. Yelton, Mr. Kroncke, Ms. Brooks, and a District administrator. Ms. Brooks was also accompanied by a CMH staff member that was assigned to advise Mother about CMH services. At Mr. Marasco's request, Ms. Brooks' supervisor and co-signer of her assessment report joined the IEP team meeting telephonically. Ms. Brooks' supervisor explained that the recommendation in the assessment report was based on the information provided to Ms. Brooks, and that if CMH received additional information; it would consider conducting another assessment. Ms. Brooks' supervisor also explained CMH's protocol for reviewing individuals for a higher level of care such as residential treatment, and that CMH would initiate a review after CMH's case management department received a referral for residential treatment assessment.

132. District IEP members adopted CMH's recommendation, and included it in the IEP offer. CMH offered 45 minute sessions of individual or group therapy three times a month, and medication service one time bi-monthly for thirty minutes at CMH offices. District offered 12 school-based counseling sessions for the year.

133. District's IEP team members also offered the same placement as in the May 17, 2010, IEP. Specifically, District offered placement at TMS with specialized academic instruction in a separate classroom for all academic subjects, four times daily, for forty

minutes. General education involvement was limited to PE and his elective. As in the May 17, 2010, IEP, District provided a vocational attendance goal that was solely Student's and Mother's responsibility. A BSP was not included.

134. Mother objected to CMH's and District's offer. Mother expressed Student's need for a program where services were available to him, and questioned how Student would access the placement and services given his history of absences and his known resistance to leaving home for the assessments.

135. Mother notified the IEP team that Student left home without her permission and had been staying with a friend for five days. She had been able to meet with him briefly.

136. Based upon Mother's decision to decline CMH's outpatient services, Ms. Brooks offered Mother a referral to the CMH children's case management division for a higher level of care, and the IEP team agreed to refer Student to CMH again.

137. Mother notified the IEP team that she intended to withdraw Student from District, unilaterally place him, and request reimbursement for the placement. Mother's notification was memorialized in the IEP notes, which were read and approved by all IEP team members, and made part of the IEP.

138. Per the notes, Ms. Brooks briefly referenced the availability of a range of mental health services offered by CMH and available to Mother. At hearing, Ms. Brooks testified that she followed CMH's practice of advising family members of the range of options available to them from a variety of funding sources during the assessment and again at the IEP. Ms. Brooks, however, could not recall whether she had an opportunity to fully brief Mother at the IEP because she felt "rushed" by Mr. Marasco. As was CMH's practice, Ms. Brooks was confident that she supplied Mother with a CMH handbook either at her assessment or at the IEP. At the IEP, she was also accompanied by a CMH parent advocate, who was there to guide Parent on accessing CMH services.

139. At hearing, Ms. Brooks's clarified CMH's role in ensuring that a pupil like Student would access its services given his year-long resistance to Mother's efforts to transport him to school and to his assessments. Ms. Brooks was confident that Student would quickly develop a rapport with his health care counselor because during his assessments with school staff and her, Student quickly became comfortable. However, according to the memorandum of understanding between District and CMH, CMH was not responsible for transportation and CMH services were to be delivered at CMH's clinic or a school site.

140. Ms. Brooks' testimony about her assessment practices and the scope of her recommendations to Student's IEP team, and her advice to Mother about other CMH services, was supported by the expert testimony of Dianne Radican, CMH's mental health services supervisor, who testified as to the practices of CMH. Ms. Radican has been a licensed clinical social worker since 1983 and has a wealth of experience in addressing the

needs of children and their families, for individual and group counseling and assessing children. During her tenure as a licensed clinical social worker, she worked with wards and court dependent youths, assessed them for residential levels of care, and made recommendations to IEP teams. Ms. Radican is an expert on IDEA mental health eligibility, assessments, and placement. She has trained mental health professionals and special education local plan area (SELPA) directors on eligibility, assessment and placement issues. Ms. Radican demonstrated a depth and clarity of understanding of CMH practices and protocols with regard to the assessment process and the factors considered in determining the level of mental health services. Her insight about CMH's assessment practices was given weight in considering the timeliness of District's mental health referral. Ms. Radican confirmed that Mr. Kronke's referral would not have been rejected if it did not include the 2010 triennial reassessment. The relevance of her insight about CMH's practices in offering services that were not solely related to special education was limited to clarifying CMH's June 24, 2010, IEP offer, its practices in determining the appropriateness of residential treatment, and in weighing the equities as a component of compensatory relief. Her interpretation of the law was not relevant.

141. Ms. Radican was also a percipient witness in that she reviewed for CMH the propriety of its rejection of the IEP team's request for residential treatment, directed Ms. Brooks' response to the IEP team, actively participated in CMH's reconsideration of residential treatment placement and IEP team meetings with Provo. Her direct interest in CMH's decision limits the weight given her testimony as an expert regarding the appropriateness of Provo.

142. Ms. Radican confirmed that the range of counseling services CMH provided to families were not exclusively for special education. Ms. Radican confirmed that these other home-based services could enhance and support the IEP services, but were voluntary, and were not part of the IEP offer. In fact, CMH generally instructed its staff not to offer non-educational services as part of a pupil's IEP. Despite the absence of other CMH services from the IEP, particularly the home-based services, Ms. Radican insisted at hearing that these services were necessary, and available to support Student, and that challenges based upon his unwillingness to leave his home to access services would be addressed. Ms. Radican maintained if a trial of therapy appointments were scheduled and missed at CMH's clinic, CMH would work with the family to make other arrangements to access services. Student's and Mother's use of these other therapies, while not included in the IEP, were considered by CMH to determine whether all options had been exhausted prior to a residential placement.

143. On May 29, 2010, at the direction of her immediate supervisor, and Ms. Radican, Ms. Brooks sent a letter to Mother at her home residence, setting forth the range of above-mentioned CMH services available to Student to help him remain in his home environment. These services, referenced in paragraph 130, above, were not included in the IEP. She requested that Mother contact her to review with her the range of possible assistance programs. Mother received the letter, but did not contact CMH.

144. On July 12, 2010, Ms. Brooks forwarded Student's referral for residential placement to the children's case management division of CMH.

145. On July 13, 2010, in a letter directed to Ms. Brooks, Claire Priester, a licensed marriage and family therapist with the children's case management division of CMH responsible for determining residential placement, rejected the referral as premature and inappropriate. Ms. Priester rejected the referral for two principal reasons. First, she found little evidence that either Student or Mother participated in mental health interventions. Other than six sessions of school based counseling, Student had only attended counseling in 2005, sporadically, and Mother's participation was minimal. In addition, Ms. Priester found Mother's refusal to participate in therapeutic interventions available through Medi-Cal, and outside special education, to be significant. She considered these other in-home services as viable therapeutic options that addressed Student's reluctance to attend therapy at a clinic. In home therapy, the therapist would establish rapport and gradually reduce resistance to attendance at school or clinic-based therapy. She also found that the full range of least restrictive educational options had not been tried. Although Student was provided with RSP support at school, a few sessions of school-based counseling and home schooling through a charter school, more restrictive settings were not tried. Ms. Priester referred to a range of options that were less restrictive than residential placement, including in-home instruction, and more restrictive placements which may be less anxiety-producing, such as a special day class for ED or an NPS.

146. On July 16, 2010, Mother withdrew Student from the District and unilaterally placed him at Provo. Student was admitted to Provo and was provided with a small class educational program administered by a special education teacher. Provo administered the Woodcock Johnson III to establish a baseline for Student's academic performance in reading, writing and math. Provo utilized District's goals from the May and June 2010 IEPs. On intake, Student stated a goal of bringing up his grades during his placement at Provo. Student was also provided a range of therapeutic services, including, individual, group, family, and recreational therapy. Provo provided individual, family, and recreational therapy, once a week, and group therapy twice weekly.

147. On August 4, 2010, Ms. Brooks notified Mother by letter to her residential street address that CMH rejected the referral for residential treatment because least restrictive options had not been tried at home or in the school environments, and invited her again, to accept psychotherapy and medication services.

*October 7, 2010 IEP*

148. On October 7, 2010, the IEP team convened to review CMH's response to the IEP team's referral for residential placement, and Student's progress at Provo. All required team members were present, including Mother, Mr. Marasco, Uncle, Ms. Brooks, another CMH representative, a District administrator and two representatives from Provo, including Ms. Jenkins, Student's case manager at Provo. Student began the fall semester in August 2010 and received instruction in Earth Science, seventh grade math, American history and

grammar and writing. Student's initial behaviors in class were similar to behaviors reported by TMS, such as noncompliance with instructions, short attention span, socializing at inappropriate times, and creating distractions. Student attended class with younger pupils. At Provo, Student exhibited more aggression towards younger pupils. He verbally bullied and intimidated younger pupils into completing his assignments. Student was never physically aggressive at Provo.

149. At the IEP team meeting, CMH recommended that the IEP team resubmit its request to CMH for an assessment for residential treatment based upon current present levels of performance and progress at Provo.

150. Carlos Moreno, a licensed clinical social worker, and clinical therapist at CMH, reassessed Student and prepared a written report on February 2, 2011. Mr. Moreno was an experienced assessor and qualified to perform the mental health assessment.

151. As part of his assessment, Mr. Moreno interviewed Student. At the time of Mr. Moreno's assessment, Student had been receiving A's and B's for coursework, except in math where he receive a C-. Student reported that his placement gave him the opportunity to catch up with his school work. Student admitted to refusing to attend TMS despite his Mother's efforts because he felt he was falling behind the other pupils and could not keep up. He believed he would never catch up so he did not think it would be worth attending. He stated that he would have gone if his classes were different. He denied that there were other reasons for his failure to attend school. He committed to improving his academic performance when he returned home by requesting placement in a small classroom setting, and completing his assignments.

152. Despite Student's apparent academic progress, Mr. Moreno did not recommend residential placement. Mr. Moreno was particularly concerned with the family's failure to access mental health interventions. He reported in detail on the family's poor counseling attendance from 2005, Mother's lack of involvement in counseling, and the absence of any sustained counseling for five years.

153. Like Ms. Priester, Mr. Moreno found that District did not attempt less restrictive educational interventions and placement. He noted that District failed to provide interventions that might have reduced Student's anxiety to school such as having someone like Mr. Kroncke develop a therapeutic alliance with Student. He noted that LRE alternatives were not tried by District including home hospital instruction, an ED-SDC class, and placement in a NPS. Mr. Moreno affirmed the original recommendations from CMH and Ms. Brooks for outpatient mental health treatment.

154. At hearing, Ms. Radican reinforced the findings of Ms. Priester and Mr. Moreno. Ms. Radican has made 200 residential placements. She maintained that placement in a residential treatment program, like Provo, is justified in narrow circumstances, where the child is a severe danger to others and to self, where the child suffers serious thought or mood disorders, is physically aggressive such that he is a danger to himself and others,

demonstrates risk taking behaviors, such as prostitution or drug abuse, has maladaptive behaviors that give rise to criminal conduct, and has behaviors that are severe in many arenas.

155. At hearing, Student's advocate, Mr. Marasco, provided an expert opinion from his years of experience as a school district psychologist as to the options available to school district before and at the IEP team meeting to encourage Student's attendance. Mr. Marasco shared some recommendations with District at the January 8, 2010 meeting reference in paragraph 48, above. Although Mr. Marasco doubted that District had an appropriate program for an ED pupil like Student, Mr. Marasco offered that District could have assigned staff to go to the home and encourage him to attend school, provide in-home instruction, and then assigned a mentor to be available to him on campus when he returned. There is no record in his extensive communications or the IEP team notes that he reviewed and approved, that he recommended alternatives to residential placement at the IEP team meetings. Mr. Marasco's testimony that his input was not reflected in the IEP team notes because the notes were written by District team members was not credible given his experience and vigilance as the advocate for Mother and Student. Inconsistent with his opinion, Mr. Marasco did not offer any evidence that he discussed less restrictive options than residential placement with Mother. Nevertheless, his opinion about less restrictive options was considered because it was consistent with CMH's concern about offering less restrictive options than residential treatment.

*April 8, 2011 IEP*

156. On April 8, 2011, the expanded IEP team met. Team participants included District, CMH, and counsel for the parties. The IEP team meeting also included representatives from Provo who joined telephonically. The team reviewed Mr. Moreno's assessment and received information provided from Provo staff who insisted that Student could only progress in a forced structure, like Provo. Although Provo staff maintained that Student was at risk for elopement, the only incidence of elopement occurred during his off campus visits with Mother where he would walk away from her without permission for a period of time.

157. District's IEP offer of services and placement remained unchanged from the June 24, 2010, IEP, as did CMH's offer.

158. Student's educational performance improved over the course of his stay at Provo. By April 2011, Student was receiving an A in Literature and Writing, a B in Integrated Science, and a C in American history (after three weeks of A's). Student still struggled with math. At Provo, Student still demonstrated task avoidance and his overt defiance persisted toward his Mother despite weekly family therapy.

159. District's 2010-2011 school year ended no later than the third week of June 2011.

160. Student left Provo in August 2011. By the time he returned home, Student had completed his seventh and eighth grade curricula. After Student returned home, Mother enrolled him in private school instead of District. Student has been engaged in his school environment and looks forward to his school day. He is involved in sports. Student takes particular pride in his attendance record. He had no absences during the 2011-2012 school year, until the hearing the time when he was out sick with a cold and high fever.

161. Mother borrowed from her family to pay for Provo. The parties stipulated to the accuracy of the documentation of her expenditures, which was inclusive of tuition (i.e., education, mental health services, room and board) and expenses (travel, and supplies). Mother expended a total of \$132, 974 dollars for tuition, and \$8,203 dollars for expenses.

### LEGAL CONCLUSIONS

1. In a special education administrative due process hearing, the party seeking relief has the burden of proving the essential elements of its claim. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].) Here, Student has the burden of proof.

#### *Issue One (A) – Failure to Reassess or Hold an IEP Team Meeting Near the Beginning of 2009-2010 School Year*

2. In Issue One (A), Student claims that District failed to provide Student a FAPE by not conducting his psychoeducational reassessment near the start of the 2009-2010 school year, or convening an IEP team meeting. District disagrees, and contends that it was not obligated to reassess Student until May 2010, when his triennial assessment was due, or convene an IEP meeting at near the beginning of the 2009-2010 school year.<sup>2</sup>

3. Under the Individuals with Disabilities Education Act (IDEA) and companion state law, students with disabilities have the right to a free and appropriate public education (FAPE). (20 U.S.C. § 1400; Ed. Code, § 56000.) FAPE means special education and related services, under public supervision and direction that are available to the student at no cost to the parents, that meet the state educational standards, and that conform to the student’s IEP. (20 U.S.C. § 1401(9); Cal. Code Regs., tit. 5, § 3001, subd. (o).)

4. California law defines special education as instruction designed to meet the unique needs of individuals with exceptional needs coupled with related services as needed to enable the student to benefit fully from instruction. (Ed. Code, § 56031.) The term “related services” includes transportation and such developmental, corrective, and other supportive services as may be required to assist a child to benefit from special education. (20 U.S.C. § 1401(26).) In California, “related services” are referred to as DIS services. (Ed.

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<sup>2</sup> Student withdrew his claim that District denied Student a FAPE by failing to refer Student to CMH for a mental health assessment in Fall 2009.

Code, § 56363, subd. (a).) DIS services may include counseling and guidance services; psychological services other than assessment and development of the individualized education program; parent counseling and training; and social worker services. (Ed. Code, § 563563, subds. (b)(9), (b)(10), (b)(11), & (b)(13).)

5. In *Board of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley* (1982), 458 U.S. 176 [102 S. Ct. 3034] (*Rowley*), the United States Supreme Court addressed the level of instruction and services that must be provided to a student with disabilities to satisfy the substantive requirements of the IDEA. The Court determined that a student's IEP must be reasonably calculated to provide the student with some educational benefit, but that the IDEA does not require school districts to provide special education students with the best education available or to provide instruction or services that maximize a student's abilities. (*Id.* at pp. 198-200.) The Court stated that school districts are required to provide only a "basic floor of opportunity" that consists of access to specialized instructional and related services which are individually designed to provide educational benefit to the student. (*Id.* at p. 201.)

6. In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. (See *Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314.) A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. (*Ibid.*) For a school district's offer of special education services to a disabled pupil to constitute a FAPE under the IDEA, a school district's offer of educational services and/or placement must be designed to meet the student's unique needs, comport with the student's IEP, and be reasonably calculated to provide the pupil with some educational benefit in the least restrictive environment. (*Rowley, supra*, at 200, 202-204.)

7. In matters alleging procedural violations, a denial of FAPE may only be shown if the procedural violations impeded the child's right to FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of FAPE, or caused a deprivation of educational benefits. (Ed. Code, § 56505, subd. (f)(2); see also *W.G. v. Board of Trustees of Target Range School District No. 23* (Target Range) (9th Cir. 1992) 960 F.2d 1479, 1484.) The definition of a FAPE requires that special education and related services be provided in conformance with a child's IEP. (See 20 U.S.C. § 1401(9).) However, to amount to a denial of FAPE, the failure to implement the IEP must be "material," i.e., the services actually provided to the child must fall "significantly short of the services required by the IEP." (*Van Duyn v. Baker School District 5J* (9th Cir. 2007) 502 F.3d 811, 822.) Minor discrepancies between the IEP and the special education and related services actually provided do not give rise to a denial of FAPE. (*Ibid.*)

8. An assessment of a pupil receiving special education and related services must occur at least once every three years unless waived by parents and school districts. (20 U.S.C. § 1414(a)(2); Ed. Code, § 56381, subd. (a)(2).) A reassessment shall be conducted when the school district determines that the educational or DIS service needs, warrant a

reassessment, or if the pupil's parents or teachers request a reassessment. (Ed. Code, § 58381, subd. (a)(1). Within 15 days of the request for assessment, the school district must provide an assessment plan. (Ed. Code § 56321 (a).)

9. Psychoeducational reassessments, like all IDEA required school assessments, must be selected and administered to best ensure that the test results accurately reflect the pupil's aptitude, achievement level, or any other factors the test purports to measure and not the pupil's impaired sensory, manual, or speaking skills unless those skills are the factors the test purports to measure. (Ed. Code, § 56320, subd. (d); 34 C.F.R. § 300.304(c)(3) (2006).) The assessor must prepare a written report that includes: (1) whether the student may need special education and related services; (2) the basis for making that determination; (3) the relevant behavior noted during observation of the student in an appropriate setting; (4) the relationship of that behavior to the student's academic and social functioning; (5) the educationally relevant health, development and medical findings, if any; (6) if appropriate, a determination of the effects of environmental, cultural, or economic disadvantage; and (7) the need for specialized services, materials, and equipment. (Ed. Code, § 56327.) The report must be provided to the parent at the IEP team meeting required after the assessment. (20 U.S.C. § 1414(b)(4)(B); Ed. Code, § 56329, subd. (a)(3).)

10. An IEP must be reviewed annually, but must also be reviewed periodically, where there is a lack of expected progress toward annual goals and in the general education, to review the assessment, or to consider positive interventions and supports, or other strategies, to address behavior. (Ed. Code, § 56380, subd. (a).) Revisions to the IEP can be made without a meeting and the changes to the IEP could be made in a written document signed by the school district representative and the Parent. (Ed. Code, § 56380.)

11. An IEP meeting to review the results of the assessment must be held within 60 days from the receipt of the parent's written consent to the assessment, with certain exceptions for vacation days and other circumstances. Parent may agree, in writing, to an extension of the 60-day period. (Ed. Code, §§ 56043, subd. (f)(1); 56344, subd. (a).)

12. Student met his burden of proof that District committed a procedural violation by not submitting an assessment plan to Mother and conducting the psychoeducational assessment near the beginning of the 2009-2010 school year, however, Student failed to show that the failure to assess resulted in a denial of a FAPE. School districts are not required to reassess students more than once every three years, unless District determines a reassessment is warranted to address educational or services needs, or unless Student's parents or teachers request a reassessment. The evidence shows that District did not determine that a reassessment was warranted at the beginning of the school year because neither Mother nor any of Student's teachers requested a reassessment. However, as with District's obligation to conduct an IEP team meeting, as discussed below, there was overwhelming evidence that Student was chronically absent, inattentive, and was not progressing academically. Once Student's status was brought to the attention of District's psychologist at the February 2010 IEP team meeting, Mr. Kroncke requested an early triennial assessment. The circumstances that were present at the February 2010 IEP team

meeting that resulted in the denial of FAPE were also present during fall 2009. (Legal Conclusion 8-9; Factual Findings 1-42.)

13. However, Student did not meet his burden of proof that District's failure to deliver an assessment plan or conduct the psychoeducational reassessment resulted in the denial of FAPE as there was no evidence that the assessment would have been completed prior to Mother's unilateral withdrawal of Student from District in mid-October 2009. As set forth below, District was on notice by September that revisions to the IEP were required. However, given the statutory timelines to complete the assessment, there is no evidence that the assessment would have been completed prior to Mother's unilateral withdrawal of Student from District.

14. Accordingly, Student did not demonstrate that District's procedural violation of its duty to reassess in fall 2009 significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of FAPE, or caused a deprivation of educational benefits. (Legal Conclusions 1, 3-11; Factual Findings 1-46,148.)

15. Student met his burden of proof that District committed a procedural violation, by not initiating an IEP meeting at the beginning of the 2009-2010 school year to review Student's behaviors, adjust his schedule, modify his placement, or find other ways to encourage him to attend school. The evidence showed that within a few weeks of the 2009-2010 school year, Student was actively repeating his pattern of high absenteeism and disengagement from school tasks. Mother had successfully worked with the IEP team the previous year to reduce his coursework by changing teachers, and providing him with more support. Even then, Student completed his previous school year at the bottom of his class. Seeking a similar schedule adjustment in fall 2009, Mother consulted with the school counselor in the third week of school. Although Mother did not request an IEP meeting at that time, District had a duty to call an IEP team meeting after Mother contacted the school counselor. Notably, Mr. Yelton, who was Student's new case manager, was also his advisement teacher. As such, Mr. Yelton was the first teacher Student met each day, and was charged with knowledge of his absences. Yet Mr. Yelton did not take any steps to investigate Student's absences, initiate contact with Mother, talk to his teachers, or request an IEP team meeting. Although Mr. Yelton did not recall receiving an email from Student's counselor on September 21, 2010, he should have already been in contact with Mother and convened an IEP team meeting to address Student's behaviors which impeded his access to his education. District's duty to hold an IEP team meeting is distinct from its obligation to reassess Student. An IEP must be reviewed periodically where there is a lack of expected progress toward annual goals and in the general education, or to consider positive interventions and supports, or other strategies, to address behavior. As such, District's failure to convene an IEP meeting constituted a procedural violation.

16. Student met his burden of showing that District's failure to convene an IEP team meeting resulted in a deprivation of educational benefits. Student had not been accessing his education during fall 2009. The evidence showed that Mother attempted to get help from TMS and only withdrew Student from the District after she could not obtain help

from TMS staff when Student would not get out of the car or modification of his schedule so that he had special education assistance first period. An IEP team meeting could have been held, or scheduling or placement modifications incorporated into a revised IEP, without an IEP team meeting. Based on Student's past performance when his schedule was adjusted, it was likely Student would have been able to access more of his education had changes been made earlier in the school year.

17. In sum, Student met his burden of showing that he was denied a FAPE by District's failure to hold an IEP team meeting in the fall of 2009. (Legal Conclusions 1, 3-7, 10; Factual Findings 1-46.) The remedy for this violation will be discussed separately below.

*Issues One (B) and Two (A) – Failure to Timely Refer for and Complete the CMH Assessment*

18. In Issue One (B) Student contends that District failed to implement the February 12, 2010 IEP by failing to timely refer Student to CMH, which resulted in a loss of educational opportunity. District denies that District's failure to timely refer Student resulted in a substantive violation of District's obligations to offer a FAPE, because Mother rejected District's and CMH's appropriate offer of outpatient services, and special day classes.

19. In Issue Two (A) Student contends that both District and CMH committed procedural violations by failing to respect mandated timelines to complete Student's mental health assessment, which resulted in a denial of FAPE. Specifically, as to District, Student contends that Mr. Kroncke failed to timely provide the referral package, which has been addressed in Issue One (b), and failed to ensure that CMH utilized the correct contact information for Mother, so that she would receive CMH's assessment plan. District maintains that it was not responsible for CMH's delivery of the assessment plan to Mother, and further contends that Mother contributed to the delay by failing to check her residential mail box. As to CMH, Student contends that CMH's sloppy postal practices resulted in a delay of Student's mental health assessment. In his complaint, Student alleges that CMH mailed the complaint to Mother's residential address knowing that her P.O. Box was the only appropriate address. At hearing, Student argued that there was no evidence that CMH mailed the assessment plan to Mother at all. CMH denies that it failed to timely send its assessment plan to Mother, and joins District in claiming that Mother's failure to check her residential mail box contributed to the delay.

20. Student's complaint concerns offers made prior to October 8, 2010. Prior to October 8, 2010, California law provided that the provision of mental health services that were necessary to provide a FAPE were the responsibility of county offices of mental health under the supervision of the State Department of Mental Health. (See former Gov. Code §7570, et seq., [commonly known by its Assembly Bill name, AB 3632 (Chapter 26.5)].) However, this mandate was rendered inoperative, and responsibility for the provision of services reverted completely to the local education agencies by the Governor's veto of funding for this program on October 8, 2010. (*California School Boards Ass'n, v. Brown* (2011) 192 Cal.App.4th at pp. 1519-1520.) Subsequently, by operation of AB 114, Chapter

43, Statutes of 2011, Government Code section 7576, which mandated that IDEA mental health services be provided by the state Department of Mental Health, became inoperative effective July 1, 2011, and repealed effective January 1, 2012.

21. Prior to the repeal of the mandate on October 8, 2010, a student who was determined to be an individual with exceptional needs and was suspected of needing mental health services to benefit from his or her education, could, after the school district obtained parent's consent, be referred for assessment to a community mental health service, such as CMH. (Former Gov. Code, § 7576, subd. (b).) Although under this system a county mental health department was responsible for providing the assessment and any required services, the duty to obtain written parental consent for the referral remained exclusively with the local educational agency. (See former Gov. Code, § 7576, subs. (b)(2) and (c)(2).)

22. After the local educational agency obtained parental consent for the referral, the assessment would only go forward if the district, in accordance with specific requirements, prepared a referral package demonstrating that the student met the criteria for referral. (Ed. Code, § 56331, subd. (a); Cal. Code Regs., tit. 2, § 60040, subd. (a); former Gov. Code § 7576.) A school district must initiate a referral for a mental health assessment within five working days of its receipt of parental consent to a referral. (Cal. Code Regs., tit. 2, § 60040, subd. (a).) The community mental health agency shall develop a mental health assessment plan and provide it to a parent within 15 days of receipt of the school district's referral. (Cal. Code Regs., tit. 2, § 60045, subd. (b).)

23. "Mental health assessment" means "a service designed to provide formal, documented evaluation or analysis of the nature of the pupil's emotional or behavioral disorder" that is conducted by qualified mental health professionals in conformity with Education Code sections 56320 through 56329 [detailing the numerous procedural safeguards associated with assessments]. (Cal. Code of Regs., tit. 2, § 60020, subd. (g).) Prior to October 8, 2010, a local educational agency, an IEP team, or a parent, could initiate a referral for special education pupils to a community mental health agency, if they were suspected of needing mental health services. (Gov. Code, § 7576, subd. (b); Ed. Code, § 56320; Cal. Code of Regs., tit. 2, § 60040, subd. (a); see also Cal. Code of Regs., tit. 2, § 60030 [describing interagency agreements between local educational agencies and local mental health director for provision of mental health assessments].) The following conditions must be met in order to make a referral for a mental health assessment:

(1) The pupil has been assessed by school personnel in accordance with [Education Code section 56320, et seq.]. Local educational agencies and community mental health services shall work collaboratively to ensure that assessments performed prior to referral are as useful as possible to the community mental health service in determining the need for mental health services and the level of services needed.

(2) The local educational agency has obtained written parental consent for the referral of the pupil to the community mental health service, for the release

and exchange of all relevant information between the local educational agency and the community mental health service, and for the observation of the pupil by mental health professionals in an educational setting.

(3) The pupil has emotional or behavioral characteristics that are all of the following:

(A) Are observed by qualified educational staff in educational and other settings, as appropriate.

(B) Impede the pupil from benefiting from educational services.

(C) Are significant as indicated by their rate of occurrence and intensity.

(D) Are associated with a condition that cannot be described solely as a social maladjustment or a temporary adjustment problem, and cannot be resolved with short-term counseling.

(4) As determined using educational assessments, the pupil's functioning, including cognitive functioning, is at a level sufficient to enable the pupil to benefit from mental health services.

(5) The local educational agency . . . has provided appropriate counseling and guidance services, psychological services, parent counseling and training, or social work services to the pupil pursuant to Section 56363 of the Education Code, . . . , as specified in the individualized education program and the individualized education program team has determined that the services do not meet the educational needs of the pupil, or, in cases where these services are clearly inadequate or inappropriate to meet the educational needs of the pupil, the individualized education program team has documented which of these services were considered and why they were determined to be inadequate or inappropriate.

(Former Gov. Code, § 7576, subd. (a); see also Cal. Code Regs., tit. 2, § 60040, subd. (a).)

24. If mental health services are recommended following a mental health assessment, then an IEP team meeting must be convened at which time the provision of services must be added to the IEP. (Former Gov. Code, § 7572, subd. (d).) The IEP team meeting must be scheduled within 50 days from the mental health agency's receipt of the parent's written consent to the mental health assessment (Cal. Code Regs., tit. 2, § 60045, subd. (d).) The 50-day time period for convening an IEP meeting does not include school vacations in excess of five school days. (Ed. Code, § 56344, subd. (a).) If the parent disagrees with the assessor's recommendation, the assessor is required to attend an IEP team meeting if requested by the parent. (Cal. Code Regs., tit. 2, § 60045, subd. (f).)

25. If a special education assessment determines that a child is eligible as ED, and an IEP team member recommends residential placement based on relevant assessment information, the IEP shall be expanded to include a representative of the county mental health department. (Former Gov. Code, § 7572.5, subd. (a).) If a mental health assessment determines that a student is eligible for mental health services, the assessor may recommend residential placement if the pupil eligibility is ED, as defined by the California Code of Regulations and the Code of Federal Regulations. (Cal. Code Regs., tit. 2, § 60100, subd. (a) and (b), referring to Cal. Code of Regs., tit. 5, § 3030 and 34 C.F.R. § 300.8 (c)(4)(i) (2006).)

26. In case of a dispute concerning the delivery of mental health services, a parent, student or agency may request a due process hearing, and OAH has jurisdiction to decide the matter under the procedures applicable to special education due process hearings. (Gov. Code, § 7586, subd. (a).)

*Analysis of Issue One (B)*

27. Here, as to Issue One (B), Student did not meet his burden of showing that he was denied a FAPE, despite demonstrating that District did not timely process the CMH assessment referral. There was an abundance of evidence about Mr. Kroncke's failure to make a "concurrent" referral to mental health. Mother signed the referral package on February 12, 2010, the same day of the IEP meeting, and assumed it had been delivered to CMH. However, Mr. Kroncke did not deliver the referral package to District's administrative headquarters until March 11, 2010, and District's administrator did not deliver it to CMH for another week. As a result of District's actions, CMH did not receive the referral until March 21, 2010, over a month after Mother's consent to the referral.

28. However, Student did not meet his burden of proof that District's procedural violation impeded Mother's opportunity to participate in the IEP process, or resulted in a loss of educational benefits. As discussed above, in order to obtain relief for the procedural violation of the District's failure to timely send a referral packet to CMH, Student must demonstrate that the procedural violation impeded Student's right to a FAPE, impeded Mother's opportunity to participate in the IEP process, or caused a deprivation of educational benefits. From the testimony of Mr. Marasco and Mother, it was clear that Mother was anxious to learn of Student's educational options, so that he could access his education. However, aside from Mother's justifiable impatience, there is no evidence that she was deprived of her right to participate in the IEP process, as she did so, accompanied by an advocate and family members, at the February, May and June IEP team meetings. Further, although District did not make a concurrent assessment referral to CMH, as promised, causing over one month delay in the referral, there is insufficient evidence that Student was deprived of educational benefits due to District's delay in submitting the referral package to CMH.

29. As further discussed below in Issue Two (B), Student did meet his burden by a preponderance of the evidence that District's IEP offers were not substantively appropriate and the remedy for the substantive violation will be discussed separately below. However,

District's procedural violation in delaying the CMH referral did not deprive Student of a FAPE. (Legal Conclusions 1, 7, 20-22, 71; Factual Findings 49, 51, 54, 62, 68, 71,74, 76, 78, 106, 131.)

*Analysis of Issue Two (A)*

30. In Issue Two (A), as to District, Student failed to make a threshold showing that it violated Student's procedural rights. The evidence showed that although the referral was delayed as discussed above, once District sent the referral to CMH, it had done everything it was supposed to do. Specifically, District provided CMH with the correct contact information for Mother. Documents District delivered to CMH, including the referral package and February 12, 2010, IEP, included Mother's correct residential and P.O. Box address. As set forth in Legal Conclusions 20-21, prior to October, 2010, CMH was solely responsible for securing Mother's consent for the assessment plan. In addition, for the same reasons discussed in paragraph 28, above, Student failed to show that the delay interfered with Mother's right to participate in the decision-making process regarding the provision of FAPE, or caused a deprivation of educational benefits. In sum, District had no responsibility for CMH's delivery of the assessment plan to Mother. Mr. Kroncke's assistance in delivering the assessment plan to Mother did not create a separate procedural duty for District and was not a procedural violation by District that resulted in a denial of a FAPE. (Legal Conclusions 22-23; and Factual Findings 60, 76, 102.)

31. In Issue Two (A), as to CMH, Student also failed to demonstrate that the delay in assessment was a procedural violation of the IDEA that resulted in a denial of a FAPE. In his complaint, Student claims that CMH mailed the assessment plan to Mother's residential address. At hearing, Student modified his claim to allege that CMH never mailed the assessment plan. Student cites California Evidence Code section 640 which states that a letter correctly addressed and properly mailed is presumed to have been received in the ordinary course of business. In her written communication of March 23, 2010, Ms. Brooks provided a parental consent form, as well as a request that Mother call to arrange an appointment for Student's mental health assessments by no later than April 23, 2010. Ms. Brooks's letter did not reference any address and CMH did not produce confirmation that the letter was mailed. Nevertheless, in this action Student does not benefit from the presumption of California Evidence Code section 640. Even if the California Evidence Code governed IDEA adjudications, which it does not, the presumption does not automatically favor Student. Ms. Brooks' assessment and her testimony demonstrated that she was a careful and precise person, not prone to sloppy record-keeping. Consistent with Student's pleadings, Ms. Brooks most likely forwarded the communications to Mother's street address as CMH's internal form, which Ms. Brooks' completed, required that she list Mother's residential street address, not her P.O. Box address. In contrast to Ms. Brooks, Mother admitted to being overwhelmed and disorganized. More remarkable was Mother's admission that she never checked her residential mail box. Because Mother maintained two addresses, and exclusively relied upon the US Postal Service to divert all her mail from her street address to her P.O. Box, Mother cannot attribute a procedural denial to CMH as a result of her reliance on the P.O. Box and her failure to check her residential mail box.

32. In addition, for the same reasons discussed in paragraph 28, above, Student failed to show that the delay interfered with Mother's right to participate in the decision-making process regarding the provision of FAPE, or caused a deprivation of educational benefits. As such, Student failed to meet his burden of proof on Issue Two (A) that CMH deprived him of a FAPE by delaying its assessment by approximately one month. (Legal Conclusions 21-24; Factual Findings 15, 23, 6, 8, 94-97, 100, 104-105, 114-116, 118-130-131.) Although Student failed to demonstrate that he was denied a FAPE based on procedural delays in completing the assessment, as discussed in the analysis of Issue Two (B) below, Student met his burden of demonstrating that he was ultimately not offered a FAPE.

*Issue Two (B) – Failure to Offer Appropriate Mental Health Services and Placement*

33. Student claims that District and CMH failed to offer appropriate mental health services and placement at the May 17, 2010, and June 24, 2010, IEP team meetings. Student claims that District's offer at the May 17, 2010 meeting was not materially different than the offers from previous IEPs, and did not address Student's refusal to attend school. Similarly, the IEP offer of June 24, 2010 did not provide any means for Student to access his education or health services, and unduly relied upon services from mental health that were not made part of the IEP. District and CMH claim that their offers were appropriate because they met the obligation to provide Student an educational program and services in the least restrictive environment.

34. Legal Conclusions 1, 3, through 6, and 18 through 24 are incorporated by reference.

35. The IEP is a written document for each child who needs special education and related services. The IEP must include a statement of the special education and related services to be provided to the child. (20 USC § 1414(d)(1)(A); 34 C.F.R. § 300.320 (2006).) When developing an IEP, the IEP team must consider the child's strengths, the parent's concerns, the results of recent assessments, and the academic, developmental and functional needs of the child. (Ed. Code, § 56341.1, subd. (a).)

36. When a child's behavior impedes his or her learning or that of others, the IEP team must consider, when appropriate, "strategies, including positive behavioral interventions, strategies, and supports to address that behavior." (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324 (2006); Ed. Code, § 56341.1, subd. (b)(1).) California law defines behavioral interventions as the "systematic implementation of procedures that result in lasting positive changes in the individual's behavior," including the "design, implementation, and evaluation of individual or group instructional and environmental modifications . . . designed to provide the individual with greater access to a variety of community settings, social contacts and public events; and ensure the individual's right to placement in the least restrictive environment as outlined in the individual's IEP." (Cal. Code Regs., tit. 5, § 3001, subd. (d).) An IEP that does not appropriately address behavior that impedes a child's learning denies a student a FAPE. (*Park v. Anaheim Union*

*High School Dist.* (9th Cir. 2006) 464 F.3d 1025, 1033 (*Park*); *Neosho R-V School Dist. v. Clark* (8th Cir. 2003) 315 F.3d 1022, 1028-1029.)

37. Before a residential placement can be determined as necessary for the pupil to receive special education and mental health services, the expanded IEP team must consider less restrictive alternatives. (Cal. Code Regs., tit. 2, § 60100, subd. (c).) These alternatives include providing a behavioral specialist and full-time behavioral aide in the classroom, home and other community environments, and/or parent training in the home and community environments. (*Ibid.*) The IEP team is required to document the alternatives to residential placement that were considered and the reasons why they were rejected. (*Ibid.*)

38. ESY services should be included in the IEP where the IEP team determines that the services are necessary for the provision of FAPE. (Ed. Code, § 56345, subd. (b)(3).) ESY is generally appropriate for, but not exclusive to, those pupils that have handicaps which are likely to continue indefinitely or for a prolonged period, and interruption of their educational programming may cause regression, when coupled with limited recoupment capacity, rendering it impossible or unlikely that the pupil will attain the level of self-sufficiency and independence that would otherwise be expected in view of his or her handicapping condition. (Cal. Code Regs., tit. 2, § 3043.) ESY is the period of time between the close of one academic year and the beginning of the succeeding academic year and for students who need it, a program shall be provided for a maximum of 30 instructional days for pupils other than those in special classes or centers for the severely handicapped. (Cal. Code Regs., tit. 2, § 3043(c)(d).)

39. School districts are required to provide each special education student with a program in the LRE, with removal from the regular education environment occurring only when the nature or severity of the student's disabilities is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. (20 U.S.C. § 1412 (a)(5)(A); Ed. Code, § 56031.) A placement must foster maximum interaction between disabled students and their nondisabled peers "in a manner that is appropriate to the needs of both." (Ed. Code, § 56000, subd. (b).) Mainstreaming is not required in every case. (*Heather S. v. State of Wisconsin* (7th Cir. 1997) 125 F.3d 1045, 1056.) However, to the maximum extent appropriate, special education students should have opportunities to interact with general education peers. (Ed. Code, § 56040.1.)

40. To determine whether a special education student could be satisfactorily educated in a regular education environment, the Ninth Circuit Court of Appeals has balanced the following factors: (1) "the educational benefits of placement full-time in a regular class," (2) "the non-academic benefits of such placement," (3) "the effect [the student] had on the teacher and children in the regular class," and (4) "the costs of mainstreaming [the student]." (*Sacramento City Unified School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404 (*Rachel H.*) [adopting factors identified in *Daniel R.R. v. State Board of Ed.* (5th Cir. 1989) 874 F.2d 1036, 1948-1050]; see also *Clyde K. v. Puyallup School Dist. No. 3* (9th Cir. 1994) 35 F.3d 1396, 1401-1402 [applying *Rachel H.* factors to determine that self-contained placement outside of a general education environment was the

least restrictive environment for an aggressive and disruptive student with attention deficit hyperactivity disorder and Tourette's Syndrome.].) If it is determined that a child cannot be educated in a general education environment, then the least restrictive environment analysis requires determining whether the child has been mainstreamed to the maximum extent that is appropriate in light of the continuum of program options. (*Daniel R.R. v. State Board of Ed., supra.*, 874 F.2d at p. 1050.)

41. Each special education local plan area (SELPA) shall ensure that a continuum of program options is available for special education students. The continuum of program options shall include all, or any combination, of the following, in descending order of restrictiveness: (a) regular education programs; (b) a resource specialist program (RSP); (c) DIS services; (d) special day classes; (e) nonpublic, nonsectarian school services; (f) state special schools; (g) instruction in non-classroom settings; (h) itinerant instruction; (i) instruction using telecommunication, and instruction in the home, in hospitals, and in other institutions. (34 C.F.R. § 300.115 (2006); Ed. Code §§ 56360, 56361.). The IEP team may recommend home instruction for a limited period of time where assessment information includes a medical report from the attending physician or the report of the psychologist certifying that the severity of the condition prevents pupil from attending school. (Cal. Code Regs., tit. 5, § 3051.4) Instruction in the home may be delivered individually or in small groups by a resource teacher. (*Ibid.*)

42. The Ninth Circuit Court of Appeals has endorsed the "snapshot" rule, explaining that the actions of a school district cannot "be judged exclusively in hindsight" but instead, "an IEP must take into account what was, and what was not, objectively reasonable . . . at the time the IEP was drafted." (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrman v. East Hanover Bd. Of Education* (3d Cir. 1993) 993 F.2d 1031, 1041.)

43. The IDEA requires a school district to make a formal, written offer of placement. (*Union School Dist. v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1526 (*Union*).) In *Union*, the school district failed to formally offer a placement that it deemed appropriate because the parents had expressed an unwillingness to accept the placement. The court held that the school district committed a procedural violation by failing to make a written offer. The court reasoned that a formal written offer provides a clear record of what was offered, and assists the parents in presenting complaints. (*Ibid.*)

44. Here, Student has met his burden of proof by a preponderance of the evidence that District failed to offer Student an appropriate placement and services in the least restrictive environment at the May 17, 2010, IEP. By the time of the May 17, 2010, IEP team meeting, Student had been absent from school most of the year, and had not been educated. Before Mother unilaterally placed Student in a home study charter for eight school weeks in the fall of 2009, Student had not been accessing his education. During his short time in school during fall 2009, his general education teacher reported that he could not attend even with special education aide support. By the time of the February 12, 2010 IEP, District was on notice that Student could not return to school without behavioral and

psychological supports. Yet District did not offer any interim educational options so Student could access his education until Mr. Kronke completed his assessment, and CMH became involved. By the time of the May 17, 2010, IEP team meeting, District knew from Mr. Kronke's comprehensive assessment that Student's cognitive abilities and academic profile remained relatively unchanged from his initial assessment in 2007, but that his challenges arising from his ED with regard to school performance were more profound. Simply put, Student was not accessing his education at all due to his avoidance behaviors. Mr. Kronke expressly advised the IEP team that Student wanted to come to school, but he needed help to reconnect. Notably, Mr. Kronke and Mr. Yelton had to administer their assessments at Student's home where they were able to develop a rapport with Student. Despite the above information, District offered specialized academic instruction, in language arts, math, science and social studies, in separate special education classrooms. If Student had not demonstrated severe antipathy to coming to the school campus unassisted, these more restricted classes on a general education campus might have been appropriate as the least restrictive placement option. Assuming Student did not have a history of absenteeism, the more restrictive special education classes would be the logical next step to address Student's lack of success in general education with resource support where Student's inattentive behaviors and challenges with task completion interfered with his access to education.

45. However, by May 17, 2010, District's offer of a more restrictive placement on a general education campus, without any specific offer of in-home instruction or behavior services to address Student's avoidance behaviors, was not FAPE in the LRE. District members of the IEP team never addressed Student's absenteeism, such that the SDC classes offered were appropriate only in the abstract, and presumed that Student would come to campus, a circumstance not based in history, or supported by intensive home-based services. In District's offer, Student's unique psychological needs went unmet.

46. Whereas some program modifications might have been worthwhile in fall 2009, by May 17, 2010, a few weeks before the end of the school year, Student required more concentrated behavioral services and a more restrictive placement, even on an interim or transitional basis, before he could access his education. By this time, Student's promises to return to campus without support were broken. District remained passive in its responsibility to offer Student a FAPE, instead relying exclusively on CMH to resolve Student's resistance to attending school. District's passivity was underscored by its development of an attendance goal that was the sole the responsibility of Mother and Student, and its decision not to add a BSP. At no time did the District members of the IEP team even discuss the appropriateness of in-home academic support to address Student's attendance and completion of school work. Based upon the persuasive analysis of CMH, and the reasonable opinion testimony of Mr. Marcuso, District failed to offer services that would have assisted Student in accessing his education at TMS. Based upon Mr. Kronke's opinion that Student needed help to reconnect to the campus, District should have considered more restrictive placement options, at least on an interim basis, including home instruction where a special education teacher would connect with Student at his home. Further, given Student's attendance history and grades, ESY of some type should have been offered given Student's absence from school for eighty percent of the academic year. ESY is generally reserved for

situations where the pupil needs more continuous schooling to prevent regression. Student had been absent most of the school year, and there was overwhelming evidence that he would not leave his home to access his education or therapy. The evidenced showed that Student required less restrictive measures than residential placement, but home-based support, as an interim measure, to provide him academic instruction and ready him emotionally for school in the fall.

47. In sum, District's offer in the May 17, 2010, IEP failed to offer Student a FAPE because it did not meet his unique need for services and supports to address his school attendance and work avoidance problems, and did not offer ESY. (Legal Conclusions 3-6, 9-10, 34-42; Factual Findings 1-109, 153-155.) Student's remedy for this denial of a FAPE is discussed separately below.

48. Student did not meet his burden of proof that CMH failed to offer Student appropriate services at the May 17, 2010, IEP team meeting. As discussed above, although the CMH assessment had been delayed, the delay was not attributable to CMH. Because CMH's assessment was still in progress, it cannot be said CMH failed to make an appropriate offer as of the May 17, 2010 IEP team meeting. (Legal Conclusions 21-24; Factual Findings 104-105, 110-113, 115-116, 118-129.)

49. Student also met his burden of proof by a preponderance of the evidence that District failed to offer Student appropriate placement and services at the June 24, 2010, IEP. District's placement offer remained materially unchanged from the May 17, 2010, IEP team meeting in all other respects, and, as such, suffered from similar deficiencies, as set forth above. By this meeting, the 2009-2010 school year had ended, and Student still did not have an educational program that he could access. As set forth above, the strongest criticism of District's offer came from CMH's later analysis. Specifically, CMH was barred from offering residential placement until other less restrictive options were attempted by District, and yet at no time had District even considered other placement options for Student beyond SDC classes. District's offer of an attendance goal for which Student and Mother are solely responsible underscores its refusal to offer a program which addressed Student's absenteeism.

50. District relies upon its offer of school-based counseling to satisfy Student's need for on campus psychological counseling. However, District's offer of school-based counseling was not sufficient to support Student's educational placement. District offered a total of twelve sessions of school-based counseling annually, and relied upon CMH to provide intensive mental health services. Again, the overwhelming evidence demonstrated that Student would not access TMS without assistance addressed to getting Student to leave his house, and therefore, as in the past, the IEP offer was deficient for not addressing how Student would access his school-based counseling services.

51. Likewise, District's omission of appropriate ESY services, like in-home education, to prepare Student for the next school year was inappropriate. Student required in-

home education and behavioral or mental health support, at least on an interim basis, before he could access his education at TMS or mental health services at CMH.

52. District also failed in its obligation to assist Student with accessing CMH services. At a minimum, as demonstrated by Student's willingness to go with Mr. Kroncke to his CMH assessment, Student needed to be transported to CMH by someone other than his Mother. CMH was not responsible for transporting Student to his outpatient clinic services, and given Student's recorded refusal to travel with his Mother, District was responsible. District's continued failure to offer any service, including transportation that might assist in getting Student to CMH therapy also amounted to a denial of a FAPE.

53. In sum, District's offer in the June 24, 2010, IEP of specialized academic instruction in separate classrooms without related services addressed to Student's unique needs regarding school attendance and schoolwork completion was not a FAPE. (Legal Conclusions 1, 3-6, 34-42; Factual Findings 1-155.) Student's remedy is discussed below.

54. Student met his burden of proof by a preponderance of the evidence that CMH failed to offer Student appropriate services to access his education at the June 24, 2010, IEP team meeting. Consistent with its review of the file, CMH offered outpatient services. The outpatient services were to commence immediately and would continue through the next school year. Prior to October 8, 2010, it shared with District a joint responsibility for providing special education mental health services for Student. Its assessment was comprehensive, but its offer was not consistent with its own observations of Student and Student's history of absenteeism and defiance. CMH was undoubtedly correct in its conclusion that less restrictive alternatives had not been exhausted, but it failed to make a recommendation that would provide a way to implement the District's offer of placement because the CMH offer did not address the need to get Student out of his house to participate in therapy and instruction. In communications with Mother, and at hearing, CMH personnel emphasized its in-home services which, as described, provided the type of intensive support Student needed to convince him to leave his home and access his education or therapy. Significantly, the in-home services CMH described at hearing and considered essential were not made part of the IEP offer. In fact, CMH staff was directed not to include these services in the IEP. CMH's emphasis on its in-home services was an admission that its base offer of clinic-based services was inadequate without in-home behavioral supports specified in Student's IEP. As such, CMH failed to offer Student a FAPE for the period of June 24, 2010 through and including October 8, 2010. (Legal Conclusions 1, 3-6, 20-21, 23, 34, 36-37, 41-43; Factual Findings 118-142.) Student's remedy as to CMH is discussed below.

### *Remedies*

55. Student prevailed on Issue One (A), that District denied him a FAPE by not holding an IEP team meeting in the fall of 2009. Student also prevailed as to District on Issue Two (B), that District failed to offer a FAPE at IEP team meetings on May 17, 2010 and June 24, 2010. As to CMH, Student only prevailed on part of Issue Two (B), the failure to offer appropriate services at the June 24, 2010 IEP. As to all allegations, Student contends

that he is entitled to compensatory education in the form of tuition reimbursement for Provo (inclusive of room and board, and mental health services) from July 16, 2010 through August 9, 2011, in the amount of \$132,974, and related travel and school expenses, in the amount of \$8,203, totaling \$141,177.<sup>3</sup>

56. District contests Student's request for reimbursement. District maintains that Student did not meet his burden of proving that Provo was an appropriate placement for Student. In addition, District maintains that Mother's conduct must be considered and weighed against reimbursement. District maintains that Mother possessed a single-minded interest in placing Student residentially, and out of her home, due to global and intensive family dynamics. Alternatively, District contends that CMH shared in its responsibility to offer FAPE, and that it should share in any ordered reimbursement for compensatory education beyond October 8, 2010. According to District, although CMH was not independently responsible for providing compensatory education as of October 8, 2010, the statutory amendments do not bar reimbursement for CMH's pre-October 8, 2010 IEP offers, including the time period governed by the IEP even if it post-dates October 8, 2010.

57. CMH contends that the responsibility, if any, for ensuring that Student accessed CMH's clinic for services, rested with District. CMH faults District for not exhausting least restrictive alternatives before the IEP team referred Student to CMH for residential treatment, including home hospital and NPS, and noted that District, not CMH, was responsible for transportation. CMH, like District, claims that Mother's refusal to access mental health services, contributed to her choice to unilaterally place Student in Provo, an inappropriate placement.

58. Federal law provides that a court that hears a civil action taken from a special education administrative due process hearing "shall grant such relief as the court deems appropriate." (20 U.S.C. § 1415(i)(2)(C)(iii); 34 C.F.R. § 300.516(c)(3)(2006).) The United States Supreme Court has held that this authority "confers broad discretion on the court" to grant relief that is appropriate in light of the purpose of the IDEA. (*School Committee of Burlington v. Department of Education* (1985) 471 U.S. 359, 369 [105 S.Ct. 1996, 85 L.Ed.2d 385].) The broad authority to grant relief extends to the administrative law judges and hearing officers who preside at administrative special education due process proceedings. (*Forest Grove School District v. T.A.* (2009) 557 U.S. 230 [129 S.Ct. 2484, 2494, fn. 11; 174 L.Ed.2d 168].)

59. To obtain reimbursement for a unilateral placement, parents must provide written notice at least ten days prior to the unilateral placement of their concerns, their intention to reject the school district's placement and their intention to enroll the pupil in a

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<sup>3</sup> Prior to the hearing, the parties were ordered to review Student's documentation and calculations. The parties stipulated that Student's calculations were correct, and based upon the supporting documentation, introduced into evidence as Exhibits 51 and 52.

private school at public expense. (20 U.S.C. § 1412(a)(10)(C)(iii)(I)(bb); 34 C.F.R. § 300.148(d)(1).

60. A parent may be entitled to reimbursement for placing a pupil in a private school without the agreement of the school district if the parents prove at a due process hearing that: 1) the school district had not made a FAPE available to the student prior to the placement; and 2) that the private school placement is appropriate. (20 U.S.C. § 1412(a)(10)(C)(ii); 34 C.F.R. § 300.148(c); see also *School Committee of Burlington v. Department of Ed.*, *supra*, 471 U.S. at p. 369 (reimbursement for unilateral placement may be awarded under the IDEA where the school district's proposed placement does not provide a FAPE) and *Florence County School Dist. v. Carter* (1993) 510 U.S. 7, 16 [114 S.Ct. 361, 126 L.Ed.2d 284] (*Carter*) [for purposes of awarding reimbursement as equitable relief, parent's unilateral placement must be generally appropriate, but need not meet all standards of a FAPE].)

61. The private school placement need not meet the state standards that apply to public agencies in order to be appropriate. (34 C.F.R. § 300.148(c); *Carter, supra*, 510 U.S. at p. 14 [despite lacking state-credentialed instructors and not holding IEP team meetings, unilateral placement was found to be reimbursable where the unilateral placement had substantially complied with the IDEA by conducting quarterly evaluations of pupil, had a plan that permitted the pupil to progress from grade to grade, and where expert testimony showed that the pupil had made progress].)

62. School districts and responsible parties may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Student W. v. Puyallup School District* (9th Cir. 1994) 31 F.3d 1489, 1496 (*Student W.*) The fashioning of equitable relief in IDEA cases requires a "fact-specific" analysis. (*Id.* at 1497.) The conduct of all parties must be reviewed and considered to determine whether relief is appropriate. (*Id.* at p. 1496.) These are equitable remedies that courts may employ to craft "appropriate relief." An award of compensatory education need not provide a "day-for-day compensation." (*Id.* at p. 1497.) An award to compensate for past violations must rely on an individualized assessment, just as an IEP focuses on the individual student's needs. (*Reid ex rel. Reid v. District of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524 (*Reid*)). The award must be "reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." (*Ibid.*)

63. Here, as established above, Student met his burden of proof that District committed a procedural violation that resulted in the denial of FAPE in the fall of 2009, and failed to offer a FAPE at the May 17, 2010, and June 24, 2010, IEP team meetings. Student also met his burden of proof that CMH failed to offer a FAPE at the June 24, 2010 IEP. Consequently, Student met his burden of proof that he is entitled to compensatory relief from District and CMH. Specifically, as established above, there was overwhelming evidence by the May 17, 2010, and June 24, 2010, IEP team meetings, that Student required intensive intervention to get him back to school and to attend to his school work.

64. As an initial matter, Student complied with the 10 day written notice requirement to District prior to Mother enrolling Student at Provo. Specifically, the June 24, 2010 IEP document itself reflects this intent, and at hearing District did not contest that this was sufficient notice. (Legal Conclusion 59; Factual Finding 137.)

65. District maintains that Mother's reimbursement claims should be rejected because Provo was an inappropriate placement, Mother failed to consider or access less restrictive options, and had a demonstrated preference for residential placement, particularly, Provo, especially after Student's sibling went there earlier. Although the evidence at hearing showed that Provo, or a facility like it, would not have been an appropriate placement for the District to offer, this does not mean that Student is barred from being reimbursed for it. The evidence showed that Student was not a flight risk, did not exhibit severe behaviors in school, and was not a danger to himself or to others. However, although District would not have been required to offer Student a facility like Provo, the evidence showed that District did not offer any other less restrictive options for him to access his education. By the time of the IEP team meetings, Student's educational situation was dire. Although Mother may have already concluded that Student required residential treatment, it was District's obligation to offer an appropriate placement and services. Although Mother's lack of involvement in therapy is troubling, it does not relieve District of its obligation to provide Student a FAPE under the IDEA.

66. CMH also failed to offer appropriate mental health services as demonstrated by its reliance at hearing on its contention that it was offering Student a range of intensive home-based services that were never memorialized or expressly offered at the June 24, 2010, IEP team meeting. As a policy, CMH did not offer these services as part of the IEP. As such, CMH could not rely upon these services to establish that its offer constituted FAPE and CMH's service offer outside of the IEP cannot be considered as mitigation for failure to offer a FAPE. CMH's efforts to work with Mother is laudable; however, it can not be credited with offering a FAPE when it excluded what it admitted to be necessary and appropriate home-based services from its offer.

67. Student showed by a preponderance of the evidence that Provo was appropriate within the meaning of *Carter* and related authority. Student was taught in a highly structured environment by a special education teacher. He succeeded in accessing both his seventh grade and eighth grade curriculum during his time at Provo. He also participated in therapy which he could not avoid. Upon his return, he did not resist attending school. In fact he embraced school, and participated in sports. Accordingly, the evidence supports that the intervention at Provo, although not necessary to be an offer of a FAPE, was appropriate for purposes of reimbursement following District and CMH's denial of a FAPE. (Factual Findings, 146, 148, 151, 158-161.)

68. Based upon the above analysis, District and CMH will be jointly responsible for the denial of a FAPE from June 24, 2010, through October 8, 2010. Prior to October 8, 2010, the duty to provide a FAPE was shared by District and CMH because California law designated CMH as the provider of IDEA mental health services. After October 8, 2010, by

operation of the Governor's veto and subsequent legislative action, the duty to provide Student a FAPE became the sole responsibility of District, the local educational agency for purposes of serving Student under the IDEA. (See Legal Conclusion 20.) As such, District and CMH will be jointly responsible for Student's tuition during July, August, and September, 2010, in the amount of \$26,187 dollars. District and CMH will also be jointly responsible for the October 1 through October 8, 2010 tuition, in the amount of \$2,725.40 (which equals 340.70 per day). In recognition that the hearing did not, and could not, include the issue of District and CMH's obligations to each other (see Gov. Code, §7586, subd. (d) [prohibiting public agencies from using IDEA due process hearings against each other]), and the findings of this Decision that the main deprivations of a FAPE involved District's failure to address Student's school-avoidance behaviors, District will be ordered to reimburse Mother. However, it is contemplated that outside this proceeding, CMH shall reimburse District for the portion of tuition incurred up to October 8, 2010 that was attributable to mental health services. It is expected that if District and CMH cannot settle their respective liabilities between themselves, that they will resort to the procedure in Government Code section 7585 to obtain relief by operation of California Code of Regulations, title 2, section 60600, subdivisions (a) & (b) (providing a separate administrative procedure for disputes between agencies about the financial obligations to provide related services ordered by a due process hearing decision).

69. District shall be responsible for October 8, 2010 through the end of October 2010 in the amount of \$7,835.60, November 2010 in the amount of \$10,200, December, 2010 in the amount of \$10,563, January 2011 in the amount of \$10,565, February 2011 in the amount of \$9,553, March 2011 in the amount of \$10,571, and April 2011 in the amount of \$10,228.

70. Mother's conduct must also be weighed and she was not blameless. Mother removed Student from District and placed him in a charter school that was essentially independent study. Given Student's history of attendance problems and avoidance, this was not a reasonable choice. By December 9, 2009, his charter school program ended and she knew he was not accessing his education. Instead of returning to District and requesting an IEP, she kept him out of school until January 11, 2010. Thus, District is not responsible for Student's loss of education from October 16, 2009, through January 11, 2010. During that time, Student lost eight weeks of school, or two months. Thus, the remedy for Issue One (A), is limited to the time period before October 16, 2009 and after January 11, 2010. Because Student did not present specific evidence of a remedy for failure to convene an IEP team meeting, the remedy for Issue One (A) will be combined with that for Issue Two (B), and will consist solely of partial tuition reimbursement for Provo.

71. To the extent Student contends he is entitled to reimbursement that includes ESY 2011, this remedy is also rejected. While the evidence supported a finding that Student required ESY in summer 2010 to provide him with missed seventh grade curriculum and to prepare him for eighth grade, there was no evidence that Student required ESY during summer 2011. Provo's reports by April 2011 showed that Student had substantially progressed academically. Given Provo's representations that Student ultimately caught up

academically, reimbursement for ESY 2011 is not warranted.

72. Factoring Mother's conduct of keeping Student out of school, and the lack of evidence supporting ESY 2011 attendance at Provo, Mother will not be reimbursed for the following Provo tuition: May 2011, in the amount of \$10,618, June 2011 in the amount of \$10,251, July 2011 in the amount of \$10,617, and August 2011 in the amount of \$3,060.

73. District shall be reimburse Mother for all transportation and expenses in the amount of \$ 8,203.

### ORDER

1. Within 45 days of the date of this Order, District shall reimburse Mother Student's tuition at Provo for July, August, and September, 2010, in the amount of \$26,187 dollars and for October 1 through 8, 2010 in the amount of \$2,725.40 (which equals 340.70 per day.) CMH shall reimburse District for the portion of the above tuition that is related to mental health services according to CMH's statutory responsibilities prior to October 8, 2010. District's obligation to reimburse Mother in the amount described above is not dependent on its receipt from CMH of the amount CMH owes it, and should CMH and District dispute their obligations to each other, they shall use the inter-agency dispute procedure established in California Code of Regulations, title 2, section 60600 without involving Student.

2. Within 45 days of the date of this Order, District shall reimburse Mother for Student's Provo tuition for October 9, 2010 through the end of October 2010 in the amount of \$7,835.60, November 2010 in the amount of \$10,200, December, 2010 in the amount of \$10,563, January 2011 in the amount of \$10,565, February 2011 in the amount of \$9,553, March 2011 in the amount of \$10,571, and April 2011 in the amount of \$10,228.

3. Within 45 days of the date of this Order, District shall reimburse Mother for \$8,203 for transportation and expenses related to the Provo placement.

## PREVAILING PARTY

The decision in a special education administrative due process hearing must indicate the extent to which each party prevailed on the issues heard and decided at the hearing. (Ed. Code, § 56507, subd. (d).) Student partially prevailed against District on Issue One (A); and prevailed against District on Issue Two (B). District partially prevailed against Student on Issue One (A) and prevailed against Student on Issues One (B) and Two (A). Student partially prevailed against CMH on Issue Two (B). CMH prevailed on Issue Two (A) and partially prevailed on Issue Two (B).

## RIGHT TO APPEAL THIS DECISION

The parties to this case have the right to appeal this decision to a court of competent jurisdiction. If an appeal is made, it must be made within 90 days of receipt of this decision. (Ed. Code, § 56505, subd. (k).)

Dated: March 2, 2012

/s/

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EILEEN M. COHN  
Administrative Law Judge  
Office of Administrative Hearings